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# IMPROVING THE EFFECTIVENESS OF TURKISH LEGAL REGULATIONS ON FOREIGN TERRORIST FIGHTERS IN THE LIGHT OF COMPARATIVE AND INTERNATIONAL LAW

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# Improving the Effectiveness of Turkish Legal Regulations on Foreign Terrorist Fighters in the Light of Comparative and International Law

**REPORT**

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# 1. Introduction

New forms of terrorism shifted traditional concepts of warfare as symmetrical conflicts between States into assymetrical conflicts between States and paramilitary groups or proxy conflicts between two non-State actors. Following the appearance of these new forms of conflicts, international law as well as national legislations needed to be modified accordingly. National security policies have been subjected to reforms in order to tackle these new forms of global terrorism emerging the day of the September 11 attacks.[1] In contrast to the situation before these attacks, individual States can impossibly prevent attacks stemming from globalised terrorist organisations and therefore need to coordinate their responses with the international community.

This report is a legal desk review of Turkey's legal regulations in the field of counter-terrorism, in particular pertaining to Foreign Terrorist Fighters (FTFs). The phenomenon of FTFs is relatively new but its roots go beyond the American and the French Revolutions when the term "volunteer" was used for foreign fighters. After the Peace of Westphalia,[2] the number of mercenary soldiers decreased since the new concept of sovereignty allowed States to ask their citizens for a compulsory military service in the name of common virtues and ideals. However, the phenomenon of foreign fighters did not disappear. In the American Revolution, many Haitian and, upon Benjamin Franklin's call, many European volunteers joined in the conflicts as volunteers.

Quite similarly, volunteers were involved in the French Revolution and in the historic conflicts between Spain and its former colonies in Latin America.[3] The thin line between foreign freedom fighters and FTFs is hard to be identified and mainly depends on the definition of terrorism. Therefore, the first chapter of this report (2: What is Terrorism?) is devoted to the definition of this term.

Speaking of "legal regulations", this report focuses mainly on Turkish criminal provisions dealing with counter-terrorism, but also includes administrative measures. For a better understanding of the legal situation in Turkey, the evolution of international law pertaining to the FTF threat, i.e. within the framework of the relevant United Nations Security Council Resolutions, the Global Counter Terrorism Forum, the Council of Europe and the level of the European Union will be studied in two chapters of this report. These chapters do not merely focus on international instruments designed to address the FTF threat directly (4: Phenomenon of Foreign Terrorist Fighters), but also discuss the international instruments aiming at the reduction of the incentives of terrorism by addressing terrorist financing (3: Financing of Terrorism in International Law). The legal situation in Turkey will be examined in a chapter on counter-terrorism in comparative law (5: Counter-Terrorism in Comparative Law), thus comparing the Turkish regulations with the law of some Member States of the European Union (namely the United Kingdom, Belgium, France, Spain and Germany) as well as the United States of America as a non-EU country. The in-depth analysis of the legal structures in these countries should facilitate the identification of Turkey's weaknesses along with good practices. Finally, the report will identify these weaknesses and recommend possible solutions in order to improve the effectiveness of counter-terrorism measures, particularly pertaining to FTFs (6: Improving Effectiveness of Counter-Terrorism Measures).

# 2.
# What is Terrorism?

The Oxford Dictionary defines terror as "a feeling of extreme fear" and as "violent action or the threat of violent action that is intended to cause fear, usually for political purposes".[4] The word finds its historical and political connotations after the French Revolution. Robespierre, who led the National Convention after the Revolution and become a member of the Committee of Public Safety in July 1793, formally instituted "Terror" as a legal policy and ordered to execute at least 16.594 people[5] in order to eliminate any threat to democratic virtues. This period was called the "Reign of Terror". But Robespierre's followers turned against him and accused him of using means of terrorism itself.[6] Terrorism, as explained, has started as state-centric violence then shifted to non-state actors' use of violence against states. During the Cold War, as terrorist hijackings of civilian aircrafts emerged, initial responses to terrorism at the international level focused on aviation safety. In this regard, Convention on Offences and Certain Other Acts Committed On Board Aircraft, concluded in 1963 and commonly called the Tokyo Convention, was one of the first international instruments to protect the safety of aircrafts and of persons and property on board.[7] As the collapse of the Soviet Union ended the Cold War in the early 1990s, religiously motivated terrorist groups started to spread their ideas worldwide and to bring conflicts from a national to an international level.[8]

Following the September 11 attacks, not only the majority of states responded by introducing new terrorism-related criminal offences into their domestic law but also, in addiction to these domestic responses, the international community agreed on treaties pertaining to the threat of FTFs and requiring the United Nations (UN) Member States to criminalise certain terrorist offences. Furthermore, domestic legislations have differentiated violence from terrorism. Generally, the use of violence is not exclusively reserved to organized armed groups and is not necessarily designed to disturb the public peace. Most cases in which violence is used constitute ordinary crimes and are sometimes responded by the declaration of a state of emergency and the respective measures. In contrast to this, terrorism is characterized by its main aim to force the legitimate authorities to fulfill political demands by inflicting shocking incidents on society.[9] For instance, if a man bombs a restaurant in order to receive the insured amount, this is ordinary violence. But if the man bombs a restaurant on behalf of a group and demands some political compromise, this can be considered as terrorism.[10] On the other hand, apart from violence, there are several concepts such as anarchism and guerilla warfare which are likely to be confused with terrorism because there still is no fixed legal definition of this term.

The UN resolutions adopted so far are limited to enunciating common elements of terrorism rather than give a definitive legal definition. The United Nations General Assembly (UNGA) Resolution 49/60 on measures to eliminate international terrorism, for instance, only gives some guidance by providing certain criteria that are generally associated with terrorism: "Criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable, whatever the considerations of a political, philosophical, ideological, racial, ethnic, religious or any other nature that may be invoked to justify them".[11] The UN Security Council Resolution 1566 (2004) on threats to international peace and security caused by terrorist acts goes in similar direction: "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror

in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature".[12] According to these Resolutions, a terrorist offence: 1- is a criminal act, 2- intents a serious harm, 3- provokes fear in society, 4- aims to compel a legitimate authority to do or abstain from any act (*dolus specialis*-specific intent), 5- is unjustifiable under any circumstances.

No international instrument establishes an international crime of terrorism. States have tended to address terrorist offences with their domestic criminal legal system rather than creating an international regime. Therefore, the International Criminal Court (ICC) is not allowed to exercise jurisdiction on terrorist offences.[13] Despite this tendency, a universally accepted definition with guidance of international law is crucial as the same act can constitute a terrorist offence in one state while it might enjoy impunity in another and a universally recognized definition can facilitate intergovernmental cooperation (e.g. in cases of extradition). Such a definition could also strengthen the legitimacy of war on global terror.[14] Especially after the September 11 attacks, as transnational forms of terrorism emerged, it started to become impossible for individual states to fight terrorism on their own territory. Furthermore, these new forms of terrorism were characterized by the assistance of foreign states. For these reasons, the UN Security Council Resolution 1373 (2001) calls upon all states to cooperate in their prevention and suppression of terrorist attacks.[15]

*Young* identified nine parameters of international law to define terrorism. Firstly, international law definitions require a harm caused by the action such as serious injury, death and damage to property or economic harm. Secondly, a number of conventions require the act to be independently "unlawful". Thirdly, international law requires that the act to be done in order to intimidate a population or coerce a government or international

organisation. Fourthly, the range of victims generally includes persons and property. Fifthly, international law does not require a terrorist act to be carried out in order to advance political, religious or ideological cause. Sixthly, *mens rea* elements are relevant to both the commission of the act itself and the creation of intimidatory or coercive consequences. Seventhly, international law primarily focuses on international terrorism. Eightly, an individual's act can constitute a terrorist offence since group participation is not required. Ninethly, no justification can be found for a terrorist offence.[16] Although domestic definitions can slightly differ and focus rather on domestic security, they generally contain the core elements of the terrorism such as fear, purpose and violence.

In the light of the various state practices, however, it seems even more difficult for states to adopt a clear and fix definition although, of course, domestic definitions should be in conformity with international law because terrorist organizations might be based in a state where terrorism enjoys impunity and attack another state that criminalises acts of terrorism.[17] *Schachter* remarks that a core definition can be derived from all comprehensive definitions. Terrorism can be defined on the basis of this core definition.[18] *Gross* also suggests that there is a consensus among states on common parameters characterizing terrorism such as violence, fear and purpose.[19]

Article 1 of the Turkish Law on the Fight Against Terrorism (Law No. 3713) defines terrorism as follows: "Terrorism is any kind of criminal act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force

and violence, terror, intimidation, oppression or threat".[20] In this definition, elements of the core definition of terrorism such as fear, violence and purpose can be found. But it is not clear whether Article 1 only refers to domestic terrorism or both domestic and international terrorism. Moreover, Article 3 of the Code indicates that following offences defined in the Turkish Criminal Code (Code No. 5237) constitute terrorist offences: Article 302 (Disrupting the Unity and Integrity of the State), Article 307 (Destruction of Military Facilities and Conspiracy which Benefits Enemy Military Movements), Article 309 (Violation of the Constitution), Article 311 (Offence against the Legislative Body), Article 312 (Offence against the Government), Article 313 (Armed Revolt against the Government of the Turkish Republic), Article 314 (Armed Organisation), Article 315 (Supplying Arms), Article 320 (Enlistment of Soldiers in Foreign Service), Article 310 section 1 (Assasination of the President).[21]

On the other hand, Title 18 section 2331 (5) of the United States Code, the term "domestic terrorism" means activities that "(A) involve acts dangerous to human life that are a violation of the criminal laws of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily within the territorial jurisdiction of the United States".[22] In contrast, section 2331 (1) of the United States Code defines "international terrorism" as "activities that (A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State; (B) appear to be intended (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and (C) occur primarily outside the territorial jurisdiction of the United States,

or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum".[23] While it is true that the definition of terrorism in the US legal system also refers to the core elements of terrorism, it is interesting to note that US law distinguishes between domestic and international terrorism.

Article 421-1 of the French Penal Code defines certain offences enumerated therein as "acts of terrorism where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb public order through intimidation or terror".[24]

The United Kingdom's Terrorism Act 2000 contains the core parameters as well as it defines terrorism as "(1) [...] the use or threat of action where– (a) the action falls within subsection (2), (b) the use or threat is designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public, and (c) the use or threat is made for the purpose of advancing a political, religious, racial or ideological cause." According to subsection (2) "Action falls within this subsection if it– (a) involves serious violence against a person, (b) involves serious damage to property, (c) endangers a person's life, other than that of the person committing the action, (d) creates a serious risk to the health or safety of the public or a section of the public, or (e) is designed seriously to interfere with or seriously to disrupt an electronic system".[25] In order to address international terrorism, subsection (4) clarifies that "(a) 'action' includes action outside the United Kingdom, (b) a reference to any person or to property is a reference to any person, or to property, wherever situated, (c) a reference to the public includes a reference to the public of a country other than the United Kingdom, and (d) 'the government' means the government of the United Kingdom, of a Part of the United Kingdom or of a country other than the United Kingdom."

# 3. Financing of Terrorism in International Law

One of the most important goals of counter-terrorism is to avert financial support to terrorists, since every terrorist organisation depends on financial aid in order to recruit FTFs. Although the international community had been concerned with terrorism financing for a long time the most effective measures were adopted following the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism which was intended to criminalise any unlawful, wilful and both the direct or the indirect act of financing acts that are "intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act."[26] In its preamble, the Convention refers to some General Assembly resolutions amongst of which the General Assembly resolution 51/210 of 17 December 1996 had called upon all States to take steps to prevent and counteract, through appropriate domestic

measures, the financing of terrorists and terrorist organisations. This resolution also had established an Ad Hoc Committee to elaborate international instruments against terrorism.[27] Furthermore the Convention makes reference to the General Assembly resolution 53/108 of 8 December 1998 in which the aforementioned Ad Hoc Committee's mandate was extended to the preparation of a draft international convention for the suppression of terrorist financing to supplement related existing international instruments.[28]

Art. 1(1) of the1999 United Nations International Convention for the Suppression of the Financing of Terrorism defines the "funds" which can be used to terrorism financing as "means assets of every kind, whether tangible or intangible, movable or immovable, however acquired, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit". Pursuant to Article 2(1) of the Convention,

"Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

**(a)** An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex[29]; or

**(b)** Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act".[30]

In the articles that follow, the Convention sets forth extensive obligations on States in order to create an effective counter-terrorism system. It should be noted that Article 12(2) of the Convention prohibits States from refusing "a

request for mutual legal assistance on the ground of bank secrecy" because the bank secrecy is deeply rooted in the legal systems of industrialised economies and is the primary reason to refuse requests for mutual legal assistance.[31]

The first two Security Council Resolutions, 1267[32] and 1333[33] which were adopted on 15 October 1999 and 19 December 2000 respectively, imposed on all United Nations Member States the obligation to freeze funds and other financial ressources that could benefit the Taliban. Furthermore, the Security Council established the Counter-Terrorism Committee (CTC) and the Counter-Terrorism Committee Executive Directorate (CTED) as subsidiary bodies of the Security Council and in order to monitor the compliance of all United Nations Member States with the requirements set in the Security Council Resolution 1373, adopted unanimously on 28 September 2001– therefore following the 11 September attacks – and obliging all States to criminalise any financial assistance for terrorist activities, to refrain from providing financial support and safe haven to terrorists and to share information with other States in order to prevent the commission of terrorist acts.[34] The CTC is ultimately designed to bolster the ability of all States to prevent terrorist acts both within their borders and outside. It is assisted by the CTED, which carries out the policy decisions of the Committee, conducts expert assessments of each United Nations Member State and facilitates technical assistance to States and international cooperation in the field of counter-terrorism.[35]The CTED's responsibility covers many aspects of counter-terrorism ranging from countering violent extremism, border management, human rights to FTFs and terrorism financing.

In terms of terrorism financing, the CTED has become aware of the many challenges that States face in effectively freezing assets and therefore organises expert workshops around the world in order to help States in the establishment of effective mechanisms that are consistent with international standards and obligations, including human rights standards. The CTED also helps States to counter the misuse of non-profit organizations (NPOs) and alternative remittance

systems (ARS) for terrorist-financing purposes and to detect and prevent illicit cross-border transportation of currency. In carrying out its tasks, it works closely with the relevant United Nations entities and coordinates its activities with those of external partners, including the FATF and the FATF-Style Regional Bodies.[36]

The Financial Action Task Force (FATF) is an inter-governmental body established in 1989 and designed to set standards and promote effective implementation of legal, regulatory and operational measures for combating terrorist financing, money laundering and other reated threats to the integrity of the international financial system.[37] In order to fulfil this task, the FATF issues recommendations that set international standards and are hence intended to be applied universally. Since different States often have different legal systems and therefore cannot always take the same measures, the FATF also issues reports that guide States in the implementation of measures that comply with international law but are adapted to the national particularities. Today, over 180 countries endorsed FATF recommendations.[38] Apart from the Forty Recommendations on money laundering from 1990 some of which are related to terrorist financing,[39] the FATF has so far issued nine Special Recommendations on terrorism financing that are as follows: 1- Ratification and implementation of UN instruments (starting with the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism and the Security Council Resolution 1373), 2- Criminalising the financing of terrorism and associated money laundering, 3- Freezing and confiscating terrorist assets, 4- Reporting suspicious transactions related to terrorism, 5- International Co-operation, 6- Alternative remittance, 7- Wire transfers, 8- Ensure that non-profit organisations are not misused for the purposes of terrorism, 9- Preventing cash couriers from cross-border transportation of currency and bearer negotiable instruments that are suspected to be related to terrorist financing.[40]

In its publications the FATF always refers toUN Conventions and UN Security Council resolutions. The 1999 United Nations International Convention for the Suppression of the Financing of Terrorism is one of the most influential instruments amongst them.

# 4. Phenomenon of Foreign Terrorist Fighters

The 21st century witnessed the largest flow of FTFs from nearly every corner of the world to the Middle East. While there have been approximately more than 30.000 FTFs in Syria and Iraq since 2011,[41] the number of FTFs from France is estimated to be much higher than the number of FTFs coming from Libya, Turkey or Egypt. The number of FTFs coming from Germany is estimated to be higher than the number of those coming from Pakistan. The number of FTFs coming from EU countries is around 4.000.[42] The phenomenon of FTFs is a more complicated issue to deal with than it looks at first glance and there are many international initiatives designed to improve the effectiveness of current measures against FTFs.

# 4.1: Global Counter Terrorism Forum: Good Practices and Recommendations

Counter-terrorism is a multidimensional and complex issue. In a nutshell, Terrorism has two major resources: financial resources and potential individual terrorists. Therefore, one of the vital important sides of fighting against terrorism is preventing the financing of terrorism as discussed in previous chapters. Another crucial dimension of combating against terrorism is to hinder the recruitment of FTFs who can play a significant role in the transmission of terrorism from one country to another. Particularly, FTFs who return to their homeland bring violent and extremist ideas to spread through indoctrination.[43] FTFs are generally armed individuals while abroad, but unarmed in their home country. However, they are most eligible individuals when a terrorist organisation plans to attack their home country.[44]

The September 11 attacks made it clear that the resources of terrorism cannot be addressed by a State alone. Even though the international co-operation in the field of counter-terrorism started in the 1970s with UN Conventions and the establishment of international bodies such as the FATF, it proved to be insufficient in the light of the September 11 attacks. Coming to this realization, 29 States and the European Union jointly established the Global Counter-Terrorism Forum (GCTF), an informal platform launched on 22 September 2011 in order to develop a strategic and long-term approach to counter-terrorism, particularly by reducing the number of recruitments and by monitoring the implementation of the UN Global Counter-Terrorism Strategy and Resolutions on counter-terrorism. As its first co-president, Turkey played a leading role both for foundation of the GCTF and the elaboration of good practices and recommendations.

In terms of FTFs, the most important document prepared by the GCTF is “The Hague–Marrakech Memorandum on Good Practices for a More Effective Response to the FTF Phenomenon”, a

soft law document intended to guide governments on good practices to develop policies against FTFs under four major headings: (1) radicalization to violent extremism; (2) recruitment and facilitation; (3) travel and fighting; and, (4) return and reintegration.[45] A total of 19 good practices will, once observed, improve the coherence between States in terms of counter-terrorism, particularly of FTFs.

For the first category, the governments must be sensitive when they engage communities whose members are susceptible to become FTFs. They should develop solutions for the issues which affect the susceptible community in order to prevent its members from radicalisation. Secondly, the governments should introduce positive ideas and narratives which contain non-violent solutions and positive alternatives for those who likely intend to join FTFs because of their anger towards the government. Thirdly, the governments should bring social media, analytic experts and technology innovators together in order to produce counter-narrative content. Today, social media are the media channel which is used most for the recruitment of terrorists. Producing counter-narrative against terrorist propaganda on social media would prevent young people to join terrorist organisations. Fourthly, governments should empower those who are best-placed to affect change, including youth, women, families, and civil society, to take ownership in the development and massaging of positive counter-narratives to the violent extremist agenda. Fifthly, governments should prevent the identification of FTFs with any religion, culture, race, ethnic origin or nationality. Particularly, the use of wordings like “islamist terrorism”, “islamic violence” or “arab-jew” in the media frustrates those who belong to the specific religion or culture in question.[46]

For the second category, governments should reach out to communities to develop awareness

of the FTF threat and build resilience to violent extremist messages. Because some members of communities targeted for recruitment may not be aware of the recruitment techniques of FTFs, governments need to find ways to get in touch with these communities via special channels. Culturally sensitive sepcialists can be used for this purpose. Particularly in the Middle East, Africa and South Asia, closed communities are common and members of these communities generally follow the leaders. Therefore, it is important to get in touch with these communities to support them to prevent the radicalisation of their members. Secondly, governments should collect data from their own agencies, communities and social media while respecting the rule of law and human rights. States can obtain information about known and suspected FTFs from time-tested law enforcement techniques such as the use of wiretaps, confidential informants and proactive community engagement, as well as, from lawful monitoring of social media platforms and interviews with family and community members. But in this sensitive field, all procedures must be conducted in accordance with the rule of law and human rights. Thirdly, governments may pool resources and share them with trusted mechanisms such as Interpol or Europol. Furthermore, states can collaborate with internet companies such as search engines and social media providers in order to take measures against those who engage in criminal activities leading to terrorism. Additionally, families can be informed about terrorist organisations' activities on the internet to make them aware of the activities of their children. Fourthly, States should adopt tailored and targeted approaches for counter-violent narratives to radicalisation and recruitment, based on the specific motivational factors and intended audience. Governments should also consider the specific motivational factors present in the decision to become an FTF, whether political, economic, ideological, religious, humanitarian, or tendency toward susceptibility to violence. After deeply analysing the specific circumstances, the unique solutions should be developed for the specific group.

For the third category, States must control travels of FTFs. Firstly, States should increase the sharing of local public, law enforcement and intelligence information and analysis, and corresponding best practices, through bilateral relationships and multilateral fora like Interpol or Europol to prevent FTF travel. States should share passenger name records in time for other transit states to take action

against suspected FTFs. Furthermore, preparatory terrorist offences like the travel to a foreign country to join a terrorist group or to engage in terrorist activity or provide support (to include financing and personnel) to a terrorist group, including in connection with an armed conflict, should be criminalized. Thirdly, States should apply appropriate screening measures designed to disrupt FTF travel, with particular attention to air travel. In this regard, sharing traveller data or PNR information, the screening/inspection of luggage for detecting illegal tools, which could be used for the purposes of terrorism, can be useful mechanisms. Fourthly, States should use all available tools to prevent the misuse of travel documents for FTF travel. Fifthly, State should increase their capacity to prevent FTF travel across land borders and, more broadly, take appropriate measures to prevent FTFs within their territory from planning or preparing for terrorist acts to be carried out at home or abroad. For this purpose, all States, including States of origin, transit States, and destination States, should use all appropriate law enforcement means to ensure that their territories are not used for planning or preparing for terrorist acts to be carried out, at home or abroad, by FTFs. Technology and surveillance can be utilised to ensure that FTFs do not cross the borders.

For the fourth category, governments should detect and intervene upon the return of FTFs. Firstly, States should use as wide as possible a range of information sources to anticipate and detect returnees, including the co-operation with other States and international organisations such as Interpol. Secondly, States should build and use evidence-based, individual-level risk assessment frameworks for returnees, evaluate their condition and establish appropriate engagement approaches accordingly. Returnees should not to be further radicalised after they settle down. Thirdly, States should strengthen investigations and prosecutions of FTFs, when appropriate, through improved information sharing and evidence gathering. Furthermore, international co-operation is needed in terms of information sharing in order to gather evidences regarding activities of FTFs in other countries. Fourthly, States should prepare and exercise responses to the kinds of terrorist acts for which FTFs may have special skills such as making bombs or using high-capacity firearms. Fifthly, States should develop comprehensive reintegration programmes for returning FTFs. Key principles for consideration to guide the engagement and the development of such programmess include: (1) the need to articulate

the goal of activities to reduce the risk of returnees committing terrorist acts; (2) the importance of developing targeted and tailored engagement strategies based on the specific motivational factors; and (3) the need to involve multi-disciplinary actors in law enforcement, communities, and faith-based organisations.

Additionally, the GCTF elaborated seven recommendations on returning foreign terrorist fighters (RFTFs). According to the GCTF, States should: 1- ensure timely detection of, and intensify information sharing on RFTFs within and between States; 2- use individual risk assessment tools that provide a basis for tailor-made interventions; 3- apply a case-by-case approach and address specific categories of returnees; 4- invest and develop a close partnership with local government and local communities to deal with RFTFs; 5- engage and build sustainable partnerships with multi-disciplinary actors in the private sector and civil society organisations; 6- integrate rehabilitative measures within and beyond the criminal justice response; 7- consider using administrative procedures within a rule of law framework to effectively mitigate the risk posed by RFTFs.[47]

# 4.2: UN Resolutions on Foreign Terrorist Fighters

At the international level, counter-terrorism has been shaped by the United Nations, particularly by its Global Counter Terrorism Agenda of 2006. The Agenda has, basically, four main plans of action. The action plan focuses on: 1) measures to address the conditions conducive to the spread of terrorism; 2- measures to prevent and combat terrorism; 3- measures to build States' capacity to prevent and combat terrorism and to strengthen the role of the UN system in this regard; 4- measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism.[48] In terms of FTFs, the UN strategy has been organised by UN Security Council Resolutions 2170 and 2178. The circumstances in Iraq and Syria, particularly activities of Al-Qaeda (or Al-Nusra Front/ANF in Syria) and ISIL, forced the United Nations to take action against FTFs. Both UN Security Council Resolutions were adopted unanimously which indicates the broad consensus within the Security Council in the urgency of

the FTF phenomenon.[49] Turkey has played a leading and active role for the adoption of both the Global Counter Terrorism Agenda and the Security Council Resolutions 2170 and 2178. The preamble of UN Security Council Resolution 2170 stresses the aforementioned point as follows: "The Security Council, [...] expressing concern at the flow of foreign terrorist fighters to ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida, and the scale of this phenomenon, Expressing concern at the increased use, in a globalized society, by terrorists and their supporters of new information and communication technologies, in particular the Internet, for the purposes of recruitment and incitement to commit terrorist acts, as well as for the financing, planning and preparation of their activities, and underlining the need for Member States to act cooperatively to prevent terrorists from exploiting technology, communications and resources to incite support for terrorist acts, while respecting human rights and fundamental freedoms and in compliance with other obligations under international law".[50]

Furthermore, Security Council Resolution 2170 devotes a separate part to FTFs, namely paragraphs 7 to 10, with a special focus on FTFs of ISIL, Al-Qaeda and its Syria branch ANF. The UN Security Council "[7] Condemns the recruitment by ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida of foreign terrorist fighters, whose presence is exacerbating conflict and contributing to violent radicalisation, demands that all foreign terrorist fighters associated with ISIL and other terrorist groups withdraw immediately, and expresses its readiness to consider listing those recruiting for or participating in the activities of ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida under the Al-Qaida sanctions regime, including through financing or facilitating, for ISIL or ANF, of travel of foreign terrorist fighters; [8] Calls upon all Member States to take national measures to suppress the flow of foreign terrorist fighters to, and bring to justice, in accordance with applicable international law, foreign terrorist fighters of, ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida, reiterates further the obligation of Member States to prevent the movement of terrorists or terrorist groups, in accordance with applicable international law, by, inter alia, effective border controls, and, in this context, to exchange information expeditiously, improve cooperation among competent authorities to

prevent the movement of terrorists and terrorist groups to and from their territories, the supply of weapons for terrorists and financing that would support terrorists; [9] Encourages all Member States to engage with those within their territories at risk of recruitment and violent radicalisation to discourage travel to Syria and Iraq for the purposes of supporting or fighting for ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida; [10] Reaffirms its decision that States shall prevent the direct or indirect supply, sale, or transfer to ISIL, ANF and all other individuals, groups, undertakings and entities associated with Al-Qaida from their territories or by their nationals outside their territories, or using their flag vessels or aircraft, of arms and related materiel of all types including weapons and ammunition, military vehicles and equipment, paramilitary equipment, and spare parts for the aforementioned, and technical advice, assistance or training related to military activities, as well as its calls for States to find ways of intensifying and accelerating the exchange of operational information regarding traffic in arms, and to enhance coordination of efforts on national, subregional, regional and international levels".[51] The Resolution subsequently turns to reiterate previous Resolutions on terrorist financing and ultimately gives individual terrorists' names in its Annex.

Perhaps the most important international instrument on FTFs is UN Security Council Resolution 2178 which, adopted 40 days after Resolution 2170, focuses on FTFs in detail. In the preamble Resolution 2178, the Security Council is "Expressing grave concern over the acute and growing threat posed by foreign terrorist fighters, namely individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict, and resolving to address this threat". Furthermore the preamble of the Resolution underlines the necessity to prevent the flow of FTFs and stresses the co-operation "recognizing that addressing the threat posed by foreign terrorist fighters requires comprehensively addressing underlying factors, including by preventing radicalization to terrorism, stemming recruitment, inhibiting foreign terrorist fighter travel, disrupting financial support to foreign terrorist fighters, countering violent extremism, which can be conducive to terrorism, countering incitement to terrorist acts motivated by extremism or intolerance, promoting political and religious tolerance, economic development and social cohesion and inclusiveness, ending and resolving

armed conflicts, and facilitating reintegration and rehabilitation, Recognizing also that terrorism will not be defeated by military force, law enforcement measures, and intelligence operations alone, and underlining the need to address the conditions conducive to the spread of terrorism, as outlined in Pillar I of the United Nations Global Counter-Terrorism Strategy".[52]

UN Security Council Resolution 2178 highlights the good practices and recommendations of the GCTF "Noting recent developments and initiatives at the international, regional and subregional levels to prevent and suppress international terrorism, and noting the work of the Global Counter-terrorism Forum (GCTF), in particular its recent adoption of a comprehensive set of good practices to address the foreign terrorist fighter phenomenon, and its publication of several other framework documents and good practices, including in the areas of countering violent extremism, criminal justice, prisons, kidnapping for ransom, providing support to victims of terrorism, and community-oriented policing, to assist interested States with the practical implementation of the United Nations counter-terrorism legal and policy framework and to complement the work of the relevant United Nations counter-terrorism entities in these areas".[53]

Compared to the UN Security Council Resolution 2170, Resolution 2178 solely focuses on FTFs and therefore contains much more operative measures. In this regard, the Security Council demands all FTFs to disarm and cease all terrorist acts, requires States to prevent the movement of terrorists by effective border control and control identity and travel papers, urges Member States to exchange information regarding the movement of FTFs, calls upon Member States to co-operate in their efforts to address the terrorist threat, particularly the recruitment and the financing of terrorism, cross-border issues and strategies for returnees, decides that all measures taken by Member States shall be consistent with international human rights law, international refugee law and international humanitarian law. Furthermore, the Security Council recalls its Resolution 1373 which requires all Member States to criminalise and punish terrorist offences. In that sense, traveling from one country to another for terrorist purposes, wilful collection and provision of funds, wilful facilitation for terrorist recruitment, exploiting communication technologies and social media in order to promote recruitment for terrorist organisations should be criminalised.[54] UN Security Council Resolution 2178 stresses the urgent need to implement fully and immediately this Resolution with respect to FTFs, underscores the particular need in the cases

of FTFs are associated with ISIL, ANF and other cells, affiliates, splinter groups or derivatives of Al-Qaida.

As the GCTF, the Security Council also highlights the importance of countering violent extremism in order to prevent terrorism. In its second chapter, Resolution 2178 calls upon States to enhance their efforts to counter violent extremism as a major component of counter-terrorism. Furthermore, it encourages States to engage relevant local communities and non-governmental actors in developing strategies to counter the violent extremist narrative that can incite terrorist acts, address the conditions conducive to the spread of violent extremism, which can be conducive to terrorism, including by empowering youth, families, women, religious,cultural and education leaders, and all other concerned groups of civil society and adopt tailored approaches to countering recruitment to this kind of violent extremism and promoting social inclusion and cohesion.[55]Apparently, the good practices and recommendations of the GCTF have been endorsed by the UN Security Council and incorporated in Resolution 2178. The chapter of the Resolution which is entitled "United Nations Engagement on the Foreign Terrorist Fighter Threat" recalls previous UN Security Council Resolutions such as 1267 and 1373 and requests effective co-operation between UN bodies working on counter-terrorism.

UN Security Council Resolutions 2309 and 2396 specifically aim at the prevention of travel of FTFs and require further efforts from States in this respect while reaffirming obligations resulting from previous UN Security Council Resolutions. UN Security Council Resolution 2309 particularly focuses on airplane security and requires States to make sure that airline operators pay attention on the identity of passengers using systems such as the Advanced Passenger Information (API) system and the Passenger Name Record (PNR) system. In this sense, the Security Council requires that States make sure that airlines operating in their territories provide API to the appropriate national authorities in order to detect the departure from

their territories, or attempted entry into or transit through their territories, by means of civil aircraft. Furthermore, Resolution 2309 emphasises the role of the International Civil Aviation Organisation (ICAO) with regard to increasing data sharing between airplane operators and adopting unified standards in Member States. The Security Council welcomes and supports the work of the ICAO to ensure that all measures are continuously reviewed and adapted to meet the ever-evolving global threat picture, and calls upon the ICAO, within its mandate, to continue and enhance its efforts to establish compliance with international aviation security standards through effective implementation on the ground, and to assist Member States in this regard.[56]

UN Security Council Resolution 2396, while affirming all previous Resolutions regarding terrorism, pays special attention on traveling of FTFs. In this regard, the Resolution calls upon Member States to prevent the movement of terrorists by effective national border controls and controls on issuance of identity papers and travel documents, and through measures for preventing counterfeiting, forgery or fraudulent use of identity papers and travel documents. Furthermore, Resolution 2396 calls upon Member States to notify, in a timely manner, upon travel, arrival, or deportation of captured or detained individuals whom they have reasonable grounds to believe are terrorists, including suspected FTFs, including, as appropriate, the source country, destination country, any transit countries, all countries where the travellers hold citizenship, and including any additional relevant information about the individuals, and further calls upon Member States to cooperate and respond expeditiously and appropriately, and consistent with applicable international law. Moreover, the Security Council encourages improved cooperation between the ICAO and the CTED, in coordination with other relevant UN entities, in identifying areas where Member States may need technical assistance and capacity-building to implement the obligations of this resolution related to PNR and API and watch lists.[57] Turkey, together with 56 other UN members, actively use API and PNR systems.

# 4.3: Council of Europe

The response to terrorism in Europe began with initiatives of the Council of Europe. For a long time, terrorist offences had been considered as political crimes in Europe. Therefore, following the rise of international terrorism, the European Convention on the Suppression of Terrorism was signed on 27th of January 1977 in order to keep up with the UN measures of that time. Instead of giving a definition of the term "terrorism", the Convention places certain acts not to be regarded as political offences anymore. It primarily aims at the solution of extradition problems, regarding certain offences, among European Countries. Article 1 of the Convention reads as follows:

"For the purposes of extradition between Contracting States, none of the following offences shall be regarded as a political offence or as an offence connected with a political offence or as an offence inspired by political motives:
**a)** an offence within the scope of the Convention for the Suppression of Unlawful Seizure of Aircraft, signed at The Hague on 16 December 1970;
**b)** an offence within the scope of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971;
**c)** a serious offence involving an attack against the life, physical integrity or liberty of internationally protected persons, including diplomatic agents;
**d)** an offence involving kidnapping, the taking of a hostage or serious unlawful detention;
**e)** an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons;
**f)** an attempt to commit any of the foregoing offences or participation as an accomplice of a person who commits or attempts to commit such an offence."[58]

The Articles of the Convention that follow deal with the extradition for offences designated in Article 1.

The list of offences that State parties are to "depoliticise" has been considerably extended by the Protocol amending the European Convention on the Suppression of Terrorism of 2003 which also provides for the follow-up mechanism "Conference of States Parties against Terrorism (COSTER)" responsible for implementing the procedure.[59]

Another instrument within the framework of the Council of Europe is the Council of Europe Convention on the Prevention of Terrorism of 2005[60] which all Members of the Council of

Europe have signed, though Belgium, Georgia, Greece. Iceland, Ireland, San Marino, Switzerland and the United Kingdom have not ratified it.[61] In 2018, the European Union acceded the Convention as regards matters falling within the competence in the Union in so far as the Convention may affect those common rules or alter their scope. Since the European Parliament and the Council established common Union rules on combating terrorism with Directive (EU) 2017/541 (see below), the Union has already adopted instruments in different areas covered by the Convention on the Suppression of Terrorism. Only the United Kingdom and Denmark are not taking part in the adoption of the decision on the conclusion, on behalf of the European Union, of the Council of Europe Convention on the Prevention of Terrorism.[62]

The Council of Europe Convention on the Prevention of Terrorism of 2005 dwells on two pillars: Firstly, it strengthens the co-operation in the field of the prevention of terrorism both on a domestic (national prevention policies, Article 3 of the Convention) and international level (modification of existing extradition and mutual assistance arrangements and additional means, Article 4 of the Convention). Secondly, it requires all State parties to establish criminal offences in their domestic legal system for certain acts that may lead to the commission of a terrorist offence, namely the public provocation to commit a terrorist offence (Article 5), the recruitment for terrorism (Article 6) and the training for terrorist offences (Article 7). Article 1(1) defines "terrorist offence" for the purposes of the Convention as any of the offences within the scope of and as defined in one of the international conventions on terrorism presently in force.[63] Article 8 of the Convention clarifies that these acts shall constitute criminal offences regardless the consequences of the action in individual cases: It is therefore not necessary that a terrorist offence be actually committed.

Article 5 of the Convention is the first international attempt to define the offence of incitement to terrorism and includes both direct and indirect forms of public provocations to terrorism. The provision reads as follows:

"(1) For the purposes of this Convention, public provocation to commit a terrorist offence' means the distribution, or otherwise making available, of a message to the public, with the intent to incite the commission of a terrorist offence, where such conduct, whether or not directly advocating terrorist offences, causes a danger that one or

more such offences may be committed.
(2) Each Party shall adopt such measures as may be necessary to establish public provocation to commit a terrorist offence, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.“

Article 6 concerns the solicitation of persons to commit terrorist offences:

“(1) For the purposes of this Convention, „recruitment for terrorism“ means to solicit another person to commit or participate in the commission of a terrorist offence, or to join an association or group, for the purpose of contributing to the commission of one or more terrorist offences by the association or the group.
(2) Each Party shall adopt such measures as may be necessary to establish recruitment for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.“

Pursuant to Article 7,

“(1) For the purposes of this Convention, „training for terrorism“ means to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose.
(2) Each Party shall adopt such measures as may be necessary to establish training for terrorism, as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law.“

Moreover, UN Security Council Resolutions, particularly Resolution 2178, have triggered European Law, notably the “Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism”[64] which specifically focuses on activities of FTFs. Article 4 entitled “travelling abroad for the purpose of terrorism” reads as follows:

“(1) For the purpose of this Protocol, ‘travelling abroad for the purpose of terrorism’ means travelling to a State, which is not that of the traveller’s nationality or residence, for the purpose of the commission of, contribution to or participation in a terrorist offence, or the providing or receiving of training for terrorism.
(2) Each Party shall adopt such measures as may be necessary to establish ‘travelling abroad for the purpose of terrorism’, as defined in paragraph

1, from its territory or by its nationals, when committed unlawfully and intentionally, as a criminal offence under its domestic law. In doing so, each Party may establish conditions required by and in line with its constitutional principles.
(3) Each Party shall also adopt such measures as may be necessary to establish as a criminal offence under, and in accordance with, its domestic law the attempt to commit an offence as set forth in this article."

Furthermore Article 5 concerns the nexus between the FTF phenomenon and the financing of terrorism:

"(1) For the purpose of this Protocol, 'funding travelling abroad for the purpose of terrorism' means providing or collecting, by any means, directly or indirectly, funds fully or partially enabling any person to travel abroad for the purpose of terrorism, as defined in Article 4, paragraph 1, of this Protocol, knowing that the funds are fully or partially intended to be used for this purpose.
(2) Each Party shall adopt such measures as may be necessary to establish the 'funding of travelling abroad for the purpose of terrorism', as defined in paragraph 1, when committed unlawfully and intentionally, as a criminal offence under its domestic law."

# 4.4: European Union

In the aftermath of the September 11 attacks, the European Union adopted the Framework Decision 2002/475/JHA. Like the European Convention on the Suppression of Terrorism, this EU Framework Decision did not give a fixed definition of the term "terrorism". It rather gave certain parameters of terrorist offences, which could be seen as core definitive elements, and lists terrorist offences in Article 2[65] and requested in its preamble that "The definition of terrorist offences should be approximated in all Member States, including those offences relating to terrorist groups. Furthermore, penalties and sanctions should be provided for natural and legal persons having committed or being liable for such offences, which reflect the seriousness of such offences." The Framework Decision was slightly amended by the Framework Decision 2008/919/JHA which provided for the following additional offences: the direct or indirect public provocation to commit a terrorist offence, the recruitment for terrorism and the training for terrorism.[66]

In order to improve the prevention of terrorist attacks, Council Decision 2005/671/JHA

strengthens the exchange of information and co-operation between Eurojust, Europol and the Member States.[67]

In 2017 the European Parliament and the Council replaced the Council Framework Decision 2002/475/JHA and amended Council Decision 2005/671/JHA with the Directive (EU) 2017/541 of 15 March 2017.[68] It "establishes minimum rules concerning the definition of criminal offences and sanctions in the area of terrorist offences, offences related to a terrorist group and offences related to terrorist activities, as well as measures of protection of, and support and assistance to, victims of terrorism" (Article 1 of the Directive).

Article 3 defines the term "terrorist offences" as follows:

"1. Member States shall take the necessary measures to ensure that the following intentional acts, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation, are defined as terrorist offences where committed with one of the aims listed in paragraph 2:

**(a)** attacks upon a person's life which may cause death;

**(b)** attacks upon the physical integrity of a person;

**(c)** kidnapping or hostage-taking;

**(d)** causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss;

**(e)** seizure of aircraft, ships or other means of public or goods transport;

**(f)** manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological radiological or nuclear weapons;

**(g)** release of dangerous substances, or causing fires, floods or explosions the effect of which is to endanger human life;

**(h)** interfering with or disrupting the supply of water, power or any other fundamental natural

resource the effect of which is to endanger human life;

**(i)** illegal system interference, as referred to in Article 4 of Directive 2013/40/EU of the European Parliament and of the Council in cases where Article 9(3) or point (b) or (c) of Article 9(4) of that Directive applies, and illegal data interference, as referred to in Article 5 of that Directive in cases where point (c) of Article 9(4) of that Directive applies;

**(j)** threatening to commit any of the acts listed in (a) to (i).

2. The aims referred to in paragraph 1 are:

**(a)** seriously intimidating a population;

**(b)** unduly compelling a government or international organisation to perform or abstain from performing any act;

**(c)** seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation."

The Directive distinguishes between offences relating to a terrorist group Article 4) and offences related to terrorist activities (Title III). The former refer to "directing a terrorist group" and "participating in the activities of a terrorist group, including by supplying information or material resources, or by funding its activities in any way, with knowledge of the fast that such participation will contribute to the criminal activities of the terrorist group." As to the latter category, the Directive requires the Member States to take the necessary measures to ensure that the public provocation to commit a terrorist offence (Article 5), the recruitment for terrorism (Article 7), providing and receiving training for terrorism (Article 7 and 8), travelling for the purpose of terrorism (Article 9), organising or otherwise facilitating travelling for the purpose of terrorism (Article 10), terrorist financing (Article 11) and other offences related to terrorist activities (Article 12) are punishable as criminal offences when committed intentionally. Additionally, aiding and abetting an offence referred to in Articles 3 to 8, 11 and 12, inciting an offence referred to in Articles 3 to 12 and the attempt to commit an offence referred to in Articles 3, 6, 7, Article 9(1), point (a) of Article 9(2), and Articles 11 and 12, with the exception of possession as provided for in point (f) of

> Article 3(1) and the offence referred to in point (j) of Article 3(1), is punishable (Article 14). Similar to the Council of Europe Convention on the Prevention of Terrorism of 2005 (cf. Art. 8 of the Convention), Article 13 of the Directive clarifies that for "an offence referred to in Article 4 or Title III to be punishable, it shall not be necessary that a terrorist offence be actually committed, nor shall it be necessary, insofar as the offences referred to in Articles 5 to 10 and 12 are concerned, to establish a link to another specific offence laid down in this Directive."

The current counter-terrorism measures on the level of the European Union are based on the FATF's Special Recommendations. The EU has transposed the FATF's Special Recommendations into EU law by adopting a number of Directives and Regulations. For instance Council Regulation (EC) 2580/2001 of 27 December 2001 on specific restrictive measures against certain persons and entities with a view to combating terrorism (freezing funds of suspected terrorists),[69] Council Regulation (EC) 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial ressources in respect of the Taliban of Afghanistan,[70] Regulation (EC) 1889/2005 of the European Parliament and of the Council of 26 October 2005 on controls of cash entering and leaving the Community,[71] Regulation (EU) 2015/847 of the European Parliament and of the Council of 20 May 2015 on information accompanying transfers of funds and repealing Regulation (EC) 1781/2006,[72] Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the preparation of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC,[73] and Directive (EU) 2015/2366 of the European Parliament and of the Council of 25 November 2015 on payment services in the internal market, amending Directives 2002/65/EC, 2009/110/EC and 2013/36/EU and Regulation (EU) 1093/2010, and repealing Directive 2007/64/EC.[74]

# 4.5: Human Rights of suspected Foreign Terrorist Fighters

UN Security Council Resolutions, particularly Resolution 2178, requires states to implement their measures against FTFs in comformity with human rights. Failure to comply with international human rights obligations and to respect the rule of law may even result in an increase of radicalisation. For instance, arbitrary arrests and detentions, torture or unfair trial may trigger a sense of injustice and may encourage terrorist recruitment. As stated by the UN High Commissioner for Human Rights, it should not be presumed that every individual traveling to an area of conflict has criminal intent or is supporting or engaging in terrorist activities. Therefore, the presumption of innocence should be respected in any case.[75] Furthermore, some human rights and fundamental freedoms are accepted as non-derogable rights in international law. Article 4(2) of the International Covenant on Civil and Political Rights (ICCPR) characterises some rights as non-derogable, namely the right to life (Article 6), the freedom from torture or cruel, inhuman and degrading treatment or punishment as well as the freedom from medical or scientific experimentation without consent (Article 7), the freedom from slavery and servitude (Article 8 Nos. 1 and 2), the freedom from imprisonment for inability to fulfil a contractual obligation (Article 11), the prohibition of retrospective criminal penalties (Article 15), the right to recognition before the law (Article 16) and the freedom of thought, conscience and religion (Article 18).[76] Similarly, Article 15(2) of the European Convention on Human Rights (ECHR) declares some human rights laid down in the Convention non-derogable, namely the right to life (Article 2), except in the context of lawful acts of war, the prohibition of torture and inhuman or degrading treatment or punishment (Article 3), the prohibition of slavery and servitude (Article 4

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paragraph 1), and the prohibition of punishment without law (Article 7). Some of the rights guaranteed in the additional Protocols to the ECHR are non-derogable as well, namely the abolition of death penalty in times of peace (Article 1 of Protocol No. 6), the abolition of death penalty under all circumstances (Article 1 of Protocol No. 13) and the right not to be tried or punished twice (Article 4 of Protocol No. 7).[77] Some of the non-derogable rights such as the prohibition of torture and inhuman or degrading treatment might be related to terrorist offences. Even in situations related to terrorist offences, States cannot suspend or derogate from the aforementioned fundamental rights.[78]

On the other hand, some difficulties to comply with these human rights standards may arise from the national legislation itself. States can enact broadly worded national provisions against terrorism and give broad definitions of the term "terrorism" which lack precision and allow for arbitrary and discrimatory enforcement by the national authorities.[79] As discussed in previous chapters, there is no binding and fix international definition of the term "terrorism" which is why every State has a margin in this respect. However, this margin is limited since all States must bring their domestic law in conformity with their obligations resulting from international law, which in the field of counter-terrorism is determined by the UN Security Council Resolutions discussed above and the core elements of terrorism laid down therein. Yet difficulties may arise out of inconsistent definitions in cross-border cases because the same act may constitute a criminal offence in one State while it enjoys impunity in another State. In this regard, UN Security Council Resolution 2396, while reaffirming previous Resolutions regarding counter-terrorism, requires all States to enact precise criminal provisions in conformity with human rights obligations and enforce measures through appropriate investigative strategies.[80] Furthermore, the Resolution indicates strategies regarding rehabilitation and reintegration of individuals involved in terrorist activities that this paper will examine in a separate chapter.

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The first category of human rights which needs to be paid special attention in this context concerns the right to liberty and the freedom of movement. State measures, whether legislative or administrative, can include arrest, retention, detention, travel ban on passports, non-renewal or withdrawal of identity papers and the loss of nationality. All of these measures, which are recommended to states by UN Security Council Resolutions 2178 and 2396, have serious impact on the right to liberty and the freedom of movement. Furthermore, any deprivation of liberty or movement may trigger individual complaints against States via both universal mechanisms such as the UN Committees and regional mechanisms such as the European Court of Human Rights (ECtHR).[81] In order to decide that a human right is violated, an actual deprivation needs to have taken place. In *Karker v. France*, the UN Committee found that a requirement to live in a particular area and to report to a police station was not sufficient to constitute a deprivation of liberty.[82] However, in some cases a single act may not constitute a deprivation of liberty but a cumulative act may amount to a de facto deprivation. In *Guzzardi v. Italy*, the ECtHR found that the cumulative effect of measures may resulted in a deprivation of liberty because the applicant was restricted to an island, subject to a curfew, periodic reporting requirements and restrictions on his communication with the outside world.[83] Furthermore, international law prohibits secret detention as well as extraterritorial detention under effective control of the State in question. In addition, States must not conduct any secret detention outside the territory of the State jurisdiction by using non-state actors acting indirectly on their behalf.[84]As for cases, in which suspected terrorists' movement is restricted, it has to be noted that the freedom of movement is not an absolute human right and is therefore open to restriction or suspension under specific circumstances. Restriction must be provided by law with a legitimate purpose, must be necessary (for national security), must be non-discriminatory and proportionate. Under specific criteria, a suspected terrorist may be prevented from leaving

a country inluding his own. Likewise, a suspected individual may be prevented to enter a country and even his or her own country. In this regard, States must pay special attention to the principle of non-refoulement under customary international law: If concrete circumstances that an individual might be tortured in case his entrance is denied, the entry of that individual must be allowed even if he poses a threat to national security.[85]

Another measure used against suspected terrorists is the deprivation of nationality.[86] International human rights conventions such as the ICCPR provide that everyone enjoys the right to nationality and that no one shall be arbitrarily deprived of his or her nationality.[87] However, as the International Law Commission emphasised, the right to nationality is not absolute, therefore, it is basically under discretion of sovereign States. In order to comply with their human rights obligations, States cannot grant their nationality or denaturalise any individual unless this is laid down in their domestic law in compliance with certain procedural rules set out in international law.[88] The prohibition of arbitrary deprivation of nationality is widely recognised in customary international law and treaties. On the other hand, international law allows the deprivation of nationality to some extent.[89] For instance, the European Convention on Nationality allows the loss of nationality for persons who serve voluntarily in a foreign military force; therefore, some States interpret this provision in order to apply it for FTFs as well. In addition, the same Convention and some other international conventions prohibit the deprivation of nationality in cases where the individual concerned would otherwise be stateless.[90] Statelessness does not only affect the individual's human rights but also the rights of the individual's family members. Moreover, the deprivation of nationality and the risk to become stateless may discourage FTFs who wish to return to their own country being ready to be brought to justice and may hence constitute an obstacle for the reintegration and rehabilitation of FTFs.[91]

When considering criminal measures against suspected terrorists, human rights principles regarding criminal matters such as the presumption of innocence, the prohibition of punishment without law, the prohibition of retroactive application of criminal laws, fair trial and due process of law must be respected. In this regard, criminal charges must be determined and examined by competent, impartial and

independent courts. Suspected civilians must not be tried in military courts and must be granted to have legal assistance.[92] One of the difficulties faced in most criminal proceedings against suspected terrorists is to reach evidences abroad: While generally intelligence reports play an important role in such proceedings, suspected individuals' requests to access these documents is often denied by the competent intelligence authorities for reasons of public security. In such cases, the interest of public security gets into conflict with the principle enshrined in Article 6(1)(d) ECHR that, before an accused can be convicted, all evidence against him must normally be produced in his presence at a public hearing with a view to controversial argument. Even though exceptions to this principle may be admissible, they must never infringe the rights of the defence. As a matter of principle, the accused must be given an adequate and proper opportunity to challenge and question a witness against him, either when that witness made his statement or at a later stage of the proceedings. The ECtHR deduced two general consequences from this principle and recently subjected them to a review in the case *Al-Khawaja* and *Tahery v. The United Kingdom*.[93] Firstly, there has to be a good reason for admitting the evidence a State authority denies the accused the access to. Good reasons exist, inter alia, where a witness has fear attributable to the accused. Where the witness's absence was due to a general fear of testifying not directly attributable to threats by the defendant or his agents, it is for the trial court to conduct appropriate enquiries to determine whether there are objective grounds, supported by evidence for that fear. Before a witness can be excused from testifying on grounds of fear, the trial court needs to be satisftied that all available alternatives, such as witness anonymity and other special measures, would be inappropriate or impracticable. The second consequence the ECtHR deduced from the principle was changed lately: According to an established case-law of the Court, a conviction based solely or to a decisive degree on the statement of evidence that the accused could not have access to would generally be considered incompatible with the requirements of fairness under Article 6 ECHR. This was not, however, an absolute rule and was not to be applied in an inflexible way. Where "a hearsay statement is the sole or decisive evidence against a defendant, its admission as evidence will not automatically result in a breach of Article 6 § 1. At the same time, where a conviction is based solely or decisively on the evidence of absent witnesses, the

Court must subject the proceedings to the most searching scrutiny. Because of the dangers of the admission of such evidence, it would constitute a very important factor to balance in the scales [...] and one which would require sufficient counterbalancing factors, including the existence of strong procedural safeguards. The question in each case is whether there are sufficient counter balancing factors in place, including measures that permit a fair and proper assessment of the reliability of that evidence to take place. This would permit a conviction to be based on such evidence only if it is sufficiently reliable given its importance in the case."

European Countries, including Turkey, the United Kingdom, Germany, France, Belgium and Spain are party to the ECHR and therefore accepted the jurisdiction of ECtHR. Judgments of the Court are binding for Member States, because according to Article 46 ECHR, "The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties."[94] In this regard, Member States enforce the Court's decisions according to their domestic law which either gives direct effect to the judgments or requires some additonal procedural steps like retrial. However, more or less, Member States enforce the Court's judgments –sometimes even by modifying their domestic legal provisions.[95]

Terrorism is defined neither in ECHR nor in the case law of the ECtHR. However, Article 15 paragraph 1 ECHR stipulates that "in time of war or other public emergency threatening the life of the nation, any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law." In *Lawless v. Ireland*, the ECtHR approved the derogations made by Ireland related to IRA activities because the measures were strictly limited to what was required by the exigencies of the situation and because they did not conflict with other obligations under international law; the ECtHR had the same approach in *Aksoy v. Turkey* as to the derogations made by Turkey related to PKK activities in the southeast of Turkey, but ruled in addition, that while in principle the national authorities are better placed than the international judge to decide both on the presence of an emergency and on the nature and scope of the derogations necessary to avert it, it is for the court to rule whether the States have gone beyond

the extent strictly required by the exigencies of the crisis; in the exercise of this supervision, the ECtHR gave appropriate weight to such relevant factors as the nature of the rights affected by the derogation and the circumstances leading to, and the duration of, the emergency situation and ultimately found that the derogations made by Turkey were beyond what was necessary.[96] On the other hand, the ECtHR addressed terrorism-related issues in its various judgments without ever giving a definition of terrorism. In *Ireland v. United Kingdom*, Ireland claimed that from 1971 to 1975 UK authorities exercised extra-judicial powers in Northern Ireland. Therefore, the implementation of police powers and interrogation techniques such as deprivation of sleep, food and drink used for suspected terrorists have been subjected to complaint by Ireland. According to the ECtHR, the methods used by the United Kingdom have caused intense physical and mental suffering and therefore constituted a violation of Article 3 ECHR.[97] In *Martinez Sala v. Spain*, the applicants were suspected to be sympathisers of the Catalan independence movement and arrested by Guardia Civil officers in connection with an investigation of terrorist offences. The applicants claimed that they were subjected to torture, inhuman and degrading treatment. In his conclusion, the ECtHR held that there has been no violation of Article 3 ECHR regarding the ill-treatment itself. However, the Court found a violation of Article 3 ECHR on account of the failure to conduct an effective investigation into the allegations.[98] On the other hand, in *Öcalan v. Turkey*, the ECtHR held that transferring the applicant from Kenya to Turkey and detaining of him in İmralı Island, in which applicant lives in a relative social isolation, do not constitute an inhuman or degrading treatment.[99]

The extradition or deportation of a suspected individual may amount to a violation of the ECHR if such conduct poses a risk for the individual concerned to be ill-treated. In *Daoudi v. France*, the applicant, an Algerian citizen, was arrested in France in an operation to dismantle an Al-Qaeda affiliated group who was suspected to attack the US embassy in Paris. The ECtHR held that having considered the background of the applicant there were too many allegations regarding terrorism about suspected individual. Therefore, the deportation of the applicant would amount to a violation of Article 3 ECHR if the deportation order was implemented as the applicant would be the target of Algerian intelligence agencies.[100] On the other hand, in *Othman v. United Kingdom*, the ECtHR found no violation of Article 3 ECHR

arising out of the deportation of the applicant (Omar Othman or Abu Qatada) to Jordan because, UK and Jordanian authorities made genuine efforts to obtain and provide basic assurences to ensure that the applicant would not be ill-treated in Jordan. Additionally, these guarantees would be monitored by any human rights organisation.[101] As demonstrated in the case law of the ECtHR, deportation or extradition does not *eo ipso* amount to a violation of Article 3 ECHR but only if there is an imminent risk to the deportation or extradition. In *X v. Germany*, a case concerning the expulsion of the applicant, a Russian citizen that grew up in Germany, from Germany to Russia, the applicant was a suspected individual terrorist willing to participate in terrorist offences. The ECtHR rejected the application as inadmissible on the grounds that there was no evidence showing that the applicant would be ill-treated once deported to Russia. According to the Court, the risk of being tortured or ill-treated should be a real risk likely to happen if such deportation takes place.[102]

Another important human right in the context of terrorism is the right to a fair trial which is guaranteed in Article 6 ECHR. This right has many dimensions such as the right to a public hearing in reasonable time, access to a lawyer, the presumption of innocence, the right to be informed promptly in a language the accused understands and to have his case examined before a competent court. In *Salduz v. Turkey*, the applicant was arrested on suspicion of participating in an illigal demonstration in support of the terrorist leader of PKK and was denied access to a lawyer for the duration of his custody. The ECtHR held that the deprivation of the right to have legal assistance was unfair and therefore amounted to a violation of Article 6 ECHR.[103] In *El Haski v. Belgium*, the applicant, a Moroccan citizen, was arrested and convicted for participation in a terrorist group's activities and claimed that some of the evidences for his case were obtained in Morocco by means of treatment violating Article 3 ECHR. The Court found that Belgian

courts must not use evidences without being sure that they were not obtained under torture or ill-treatment if there is reasonable doubt in this respect.[104] In *K2 v. United Kingdom*, the applicant was suspected of taking part in terrorist-related activities of Al-Shabaab in Somalia. In 2010, UK authorities deprived him of his citizenship and barred him from re-entering the United Kingdom. The applicant contested the deprivation of citizenship stating it violated his right to respect for private and family life (Article 8 ECHR). The ECtHR dismissed the application as manifestly ill-founded. Even though, according to the Court, the deprivation of citizenship might violate human rights under specific circumstances, in the applicant's case, the UK authorities acted swiftly and diligently. Furthermore, in the applicant's case, the domestic courts held that the deprivation of citizenship was lawful and that the applicant was not left stateless by the loss of his UK citizenship as he was also a Sudanese citizen.[105]

## 4.6: Prosecution, Rehabilitation and Reintegration of Foreign Terrorist Fighters

As the conflicts in Syria and Iraq are continuing to evolve, many countries are facing the complex nature of prosecution, rehabilitation and reintegration challenges and developing some strategies for those who participated in terrorism-related activities.[106] The UN Security Council Resolution 2178 calls upon all Member States to develop and implement prosecution, rehabilitation and reintegration strategies for returning FTFs.[107] Furthermore, the UN Security Council Resolution 2396 designates a special chapter entitled "prosecution, rehabilitation

and reintegration strategies" where the Security Council calls upon Member States to assess and investigate the suspected individuals whom they believe on reasonable grounds to be terrorists. The Resolution also allows States to investigate any suspected individual's family members. Furthermore, according to the Resolution, States should develop appropriate prosecution, rehabilitation and reintegration strategies and prepare risk assessments for individuals in question. All actions need to be taken in conformity with domestic and international law. Rehabilitation policies should be implemented, if appropriate, in collaboration with local communities and relevant UN institutions. The Resolution indicates that the involvement of family members including women and children may be twofold. Family members may be both supporters and victims of terrorism. Therefore, when family members are taken into account, a careful examination should take place considering these possibilities.[108]

Apart from emphasising the other efforts made by UN authorities and special agencies, UN Security Council Resolution 2396 specifically refers to "Comprehensive International Framework to Counter Terrorist Narratives" presented to the UN Security Council Secretary by the UN Security Council Sub-Committee established pursuant to UN Security Council Resolution 1373, later approved by the UN Security Council Resolution 2017/375. Furthermore, UN Security Council Resolution 2396 reiterates the Madrid Guiding Principles which were adopted by UN Security Council Resolution 2015/939 regarding threats posed by FTFs. The 35 Madrid Guiding Principles in the Annex of Security Council Resolution 939 also dedicate a special chapter for the prosecution, rehabilitation and reintegration of FTFs. Starting from guiding principle 22, the Madrid Guiding Principles contain recommendations for States on the criminalisation, prosecution, rehabilitation and reintegration of FTFs. In fact, most of the Madrid Guiding Principles are designed as similar paragraphs as can be seen in various UN Security Council Resolutions such as 1373 and 1278. For instance, Madrid Guiding Principle 30 deals with prosecution strategies as follows: "Member States should ensure that their competent authorities are able to apply a case-by-case approach to returnees, on the basis of risk assessment, the availability of evidence and related factors. Member States should develop and implement strategies for dealing with specific categories of returnees, in particular minors, women, family members and

other potentially vulnerable individuals, providers of medical services and other humanitarian needs and disillusioned returnees who have committed less serious offences. Prosecution strategies should correspond to national counter-terrorism strategies, including effective strategies to counter violent extremism." Additionally, Madrid Guiding Principle 31 contains recommendations on the rehabilitation and reintegration strategies: "Member States should consider appropriate administrative measures and/or rehabilitation and reintegration programmes as alternatives to prosecution in appropriate cases. Such measures should be used in a manner compliant with applicable international human rights law and national legislation and should be subject to effective review."[109] As demonstrated, these principles appear more like a collection of UN Security Council recommendations in one single paper. Therefore, the prosecution, reintegration and rehabilitation are left for domestic legislation.

As explained above, the most effective measures against FTFs are domestic measures. However, these measures have to be implemented in conformity with international law including international human rights. For instance, international law prohibits the deprivation of citizenship if the suspected individual is at risk to become stateless. Therefore, in the United Kindom, France and Belgium, the deprivation of nationality can only be ordered to a binational person. The national ciriminal and administrative measures regarding returnees are always changing. In France, women have traditionally rather been always considered as victims of terrorism. However, as from 2016, French authorities noticed that many women travelled to Syria and Iraq to take part in terrorist activities. For this reason, in France, some women are also assumed FTFs and held in custody. Furthermore, the French legislation on the State of Emergency was amended several times in recent years in order to tackle FTFs including returnees. In this regard, the Ministry of the Interior can block websites that promote terrorism, the police can use extended powers and may order house arrests, and French returnees can see their social allowences suspended. Prohibition of travelling or leaving their residence for certain periods can be applied to returnees. On the other hand, the measures taken by States are quite similar. Many countries apply travel and passport bans, deprivation of citizenship etc.

In the United Kingdom, section 2 et seq. of the

Counter-Terrorism and Security Act 2005 allow the Secretary of State to impose – in addition to deprivation of citizenship or travel ban if need be – a Temporary Exclusion Order for certain individuals that have left the country and are suspected of being involved in terrorism-related activities requiring them not to return to the United Kingdom unless the return is in accordance with a permit to return issued by the Secretary of State before the individual began to return, or the return is the result of the individual's deportation to the United Kingdom.[110] In the United Kingdom, the Secretary of State generally deprives an individual of their British citizenship if he or she holds dual nationality. However, since 2014, section 40 subsection 2 of the British Nationality Act 1981[111] allows the Secretary of State to issue a deprivation order even if the person concerned would be rendered stateless. Yet, according to certain authors, this authorisation has not been applied so far.[112] On the other hand, Turkish Law also allows the deprivation of citizenship. Pursuant to Article 29 of the Code of Citizenship No. 5901,

"**(1)** Those persons who are determined to be involved in the acts written below by the official authorities, may lose Turkish citizenship upon the decision of the President of the Republic.

**a)** Those persons who render services for an alien State which is contradicting with the interests of the Turkish State and who do not voluntarily terminate the services within a reasonable period of not less than three months, despite a notification issued by diplomatic representations abroad or by local administrative authorities within Turkey.

**b)** Those persons who render any kind of service voluntarily for a State in war with Turkey without the permission of the President of the Republic.

**c)** Those persons rendering military service voluntarily for an alien State without obtaining permission.

**(2)** Citizens who are subject to investigation or prosecution due to crimes stated in Articles 302, 309, 310, 311, 312, 313, 314 and 315 of the Turkish Criminal Code No. 5237 dating from 26 September 2004 and who cannot be reached due to being abroad, are notified to the Ministry within one month after this situation is discovered by the Public prosecutor at the stage of investigation or by the judge at the stage of prosecution, for revocation of their citizenship. In the case that they do not return to the country within three

months despite the call for return at the Official Gazette, Turkish citizenship of these persons may be revoked by decision of the Presidency of the Republic."[113]

As the provisions of the Turkish Criminal Code cited in this Article relate to criminal offences against the State and the constitutional order, a FTF may be deprived of his or her nationality.

In terms of rehabilitation and reintegration programmes, Germany is the most successful country in Europe (together with Denmark). Several strategic plans have been conducted by public authorities in collaboration with local communities and religious authorities. The German government is actively working on improving deradicalization and reintegration strategies both in civil life and in prisons. The Violence Prevention Network initiated by the German Federal Ministry of the Interior monitors deradicalisation policies in prisons. The targeted individuals are both activities of international terrorist organisations such as ISIL and Al-Qaeda conducted by FTF abroad and individuals who are imprisoned for their involvement in terrorist activities on German territory. In their projects, the Ministry categorised three groups of terrorist fighters: those who are in process of radicalisation, those who are already radicalised and those who are abroad but wish to come back as returnees. German authorities develop counter-narratives against radicalisation tailored for each group.[114] On the second level, Belgium is another example which implemented such strategies to prevent radicalisation, even though not as intense as Germany. In 2005, a national plan called "Plan R" was introduced and several additional action plans have been implemented to date. The national plan focused on eradication of factors of frustration amongst the population and the prevention of radicalisation in prisons. In this regard, several action plans reviewed in 2013 and 2015 regarding the fields of education and youth assistance in order to implement both deradicalisation of people and rehabilitation of individuals who are already radicalised or returned from conflict zones.[115]

Some States do not implement unified policies on the public level specifically targeting FTFs but rather focus on general counter-terrorism measures. However, some of the policies do focus on the FTF phenomenon. For instance, British Government conducts a deradicalisation programme called "channel" in order to reduce frustration amonst British citizens and to prevent

# “Turkey needs to pay special attention”

them from travelling to Syria or Iraq. Additionally, British authorities actively cooperate with local religious communities in order to spread counter-extremist narratives. Furthermore, a programme called “prevent” is designed for the education of teachers in order to increase their capability to detect and prevent radicalisation amongst students. Another programme designed for prisoners called “ibaana” aims to support mainstream and moderate ideas in order to prevent radicalisation amongst prisoners. Moreover, a national database which allows to profile prisoners according to their potential of being a terrorist has been created. Several private charities and foundations also support the British Government in its fight against terrorism. Similarly, France introduced repressive measures against terrorism and the measures have become more strict after the recent terrorist attacks in Paris and Nice. In terms of fight against radicalisation and strategies on rehabilitation, the French authorities focused on the Internet and social media. Public authorities prepared several short films and public service advertisements which describe the process of radicalisation and picture the result of becoming an extremist.[116]

Although Turkey is not the number one country whose citizens join foreign terrorist groups fighting in Syria and Iraq, Turkey needs to pay special attention to this issue since the country shares its borders with both two countries and hosts more than 4 million asylum seekers fled from Syria. Turkey is both conducting military operations against terrorists on an international level and organising programmes to prevent radicalisation on a domestic level. For instance, as part of rehabilitation programmes, religious preachers appointed by Diyanet, the Turkish religious authority, visit prisons periodically and introduce counter-narratives of extremism. Furthermore, the Ministry of Youth and Sport organises youth camps and provides basic knowledge on the results of extremism. Similarly, Turkish public authorities carried out several integration programmes for Syrian asylum seekers in order to prevent them from returning back and joining extremist groups. Turkey also carried out some assistance programmes, in collaboration with EU and UN agencies for Syrian asylum seekers.[117]

On the one hand, in general, there is no a tailored "national plan" or a specific institutional structure on preventing and countering violent extremism (P/CVE) in Turkey. National Security Council (Milli Güvenlik Kurulu) meets once in every two months and discusses the very imminent threats against National Security. Because of the lack of hierarchial institutional structure on P/CVE strategies, it seems ultimate policy maker and coordinator is the Presidency. On the other hand, Turkey contributes, adopts and implements international strategies and policies on P/CVE in line with Law Nos. 6415 and 3713 and in accordance with relevant UNSC resolutions and treaties, rather than preparing a "national plan". According to OHCHR document regarding "Turkey's Contribution to the Report to be Prepared in Accordance with Resolution 30/15 entitled 'Human Rights and Preventing and Countering Violent Extremism'[118] ", Turkey actively contributes to the efforts of this global platform and GCTF-inspired Hedayah Center, aimed at addressing violent extremism. Turkish Government is also co-leading, together with the United States, an initiative to address the life cycle of radicalization with in the GCTF. As a matter of fact, Turkey's P/CVE policies are composed mainly of soft tools that embody a number of interventions such as community-policing, family support, religious counseling, educational and employment incentives and

development policies with particular emphasis on vulnerable segments of the society. The document further indicates that several Turkish authorities including relevant Ministeries such as Ministry of Justice, Ministry of Family Labour and Social Services, Ministry of National Education, Ministry of Youth and Sports, Turkish National Police (TNP) and Directorate of Religious Affairs (Diyanet) are conducting, independent but inter-related, P/CVE strategies and implementing numerous programmes on deradicalisation policies in concordance with international efforts.[119]

As examined comparatively, the engagements of States in policies dealing with FTF are lower than presumed, although all states have taken criminal measures against terrorist offences and the majority of European countries implement similar policies in order to prevent the flow of FTF. However, all policies should be thoroughly implemented in conformity with international law and the UN Security Council principles. Therefore, States must participate in rehabilitation and reintegration processes as well as foster the prosecution and punishment of FTFs. In this regard, the majority of national policies of rehabilitation and reintegration are still underdeveloped. Most States do not have any governmental institution or council specifically focusing on FTFs, particularly returnees. The legal and administrative frameworks are generally designed to punish terrorist fighters. Of course, in order to protect public order and human life, criminal measures are to be the top priority for States. However, to reduce level of radicalisation, such expert institutions should investigate psychological, educational, ideological or economic reasons standing behind extremism. Therefore, at the same time, tailored policies aiming at rehabilitation and reintegration should be implemented in order to prevent further radicalisation. Such policies need to be conducted not only in prisons but also in institutions influencing public life such as schools, media channels and local communities. Furthermore, prosecuted terrorists, traumatised returnees and their family members should not be deprived of their fundamental human rights.

# 5.
# Counter-Terrorism in Comparative Law

This chapter focuses on the legal frameworks concerning the criminalisation of FTF and terrorism financing in a couple of States that are FATF members, namely Turkey, the United States of America, the United Kingdom, Germany, France, Spain and Belgium.

# 5.1: Turkey

Turkey has been exposed to terrorism, including cross-border terrorism, for years. Fighting against the Kurdish seperatist movement PKK for approximately40 years has been across-border issue since the PKK and its co-related organizations are based on Northern Iraq and Syria.[120]The United States-led Iraq War that followed the September 11 attacks even intensified Turkey's exposure to cross-border terrorism since many FTF went to Iraq and remained there as the region drifted into a chaos that reached it speak after the Syrian Civil War started in 2011. ISIL has been created independently from Al-Qaeda militants and declared sovereignty over parts of Iraq and Syria. Cross-border activities of PYD, a co-related group of PKK, ISIL and Al-Qaeda started to affect Turkey's public order.[121] Therefore, Turkey has adopted new legal provisions to tackle FTF ranging from financing terrorism to immigration law.

Turkey ratified the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism and implemented it by adopting Law No. 6415 entitled "Law on the Prevention of Financing of Terrorism" as clarified in Article 1 of the Law: "This Law is situated in the context of an effective fight against terrorism and the financing of terrorism; implementing the 1999 International Convention for the Suppression of the Financing of Terrorismand the United Nations Security Council Resolutions related to counter-terrorism and the financing of terrorism within the context of this Law, it has been prepared in order to determine the procedure and the principles related to the criminalisation of financing of terrorism and freezing assets for the purpose of the prevention of financing of terrorism."Pursuant to Article 3(1)it is punishable to provide or collect funds with the aim a) that the crimes of wilful homicide or serious bodily injury with the purpose to frighten or intimidate the population or to compel a government or an international organisation to do abstain from doing any act be committed, b)that a terrorist offence falling within the scope of the Law No. 3713 on the Fight Against Terrorism be committed, or c) that criminal acts forbidden by the International Conventions to which Turkey is a State party and that are enumerated in the Annex of the 1999 International Convention for the Suppression

of the Financing of Terrorism be committed. According to Article 4,"Any person who provides or collects funds for a terrorist or terrorist organisations with the intention that they are used or knowing and willing that they are to be used, even without being linked to a specific act, in full or in part, for a crime as set forth in Article 3 shall be punished by a term of imprisonment between five and ten years, provided that this act does not constitute another offence requiring a heavier punishment".In the chapter of the Law titled "freezing of assets", Article 5 is designed to comply with the relevant Security Council Resolutions:

"**(1)** Decisions on freezing of assets in the possession of persons, institutions and organisations listed in the United Nations Security Council Resolutions 1267 (1999), 1988 (2011) and 1989 (2011) shall be executed without delay through the decision of the President of the Republic published in the Official Gazette.

**(2)** The Ministry of Foreign Affairs shall notify the United Nations Security Council of the decisions made.

**(3)** Applications against the United Nations Security Council Resolutions shall be conveyed to the United Nations Security Council by MASAK through the Ministry of Foreign Affairs."

According to Articles 1 to 5 of Law No. 6415 on the Prevention of the Financing of Terrorism[122] this transmission is conferred to the Financial Crimes Investigation Board (Mali Suçları Araştırma Kurulu, hence forth: MASAK).

According to MASAK statistics, the Turkish Council of Ministers, who was responsible to the execution decision according to Article 5 section 1 of Law No. 6415 in its original version,[123] freezed the assets of 416 (natural and legal) persons in 2013, just after Law No. 6415 has entered into force, in conformity with the United Nations Security Council Resolutions 1267(1999), 1988 (2011) and 1989 (2011). The whole list contained names of natural and legal persons affiliated to Al-Qaeda and the Taliban regime.[124] After the first decision the list has been updated whenever considered necessary. At the beginning, ISIL or

DAESH was considered as Al-Qaeda's regional branch in Iraq. But following its classification as a separate terrorist organisation, the Council of Ministers' decisions started to mention DAESH (ISIL) besides Al-Qaeda and Taliban. ISIL has been dominant after the UN Security Council Resolutions were adopted. It can therefore be concluded that by freezing the assets of members of Al-Qaeda, ISIL and the Taliban regime, Turkey has met its obligations deriving from International Law. The fact that PKK and its sub-branches are missing in the national lists, is no obstacle to this conclusion: Since the UN Security Council Resolutions do not indicate neither the Kurdish separatist group PKK nor its sub-branches such as PYD and YPG, the President of the Republic's decisions make no mention of these organisations either. Although Turkey all eges that the PKK terrorism has reached an international dimension,there seems to be some resistance among the permanent members of the United Nations Security Council.

As an emanation of the obligation of all States to cooperate with other States which roots in Security Council Resolution 1373, the freezing of assets of an individual can also be requested by any foreign State. According to Article 6 of Law No. 6415,

"**(1)** In case of a request made by the government of a foreign State to Turkey on the freezing of assets under the possession of a person, institution or organisation, the decision on the request assessed by the Assessment Commission, shall be made by the President of the Republic.[125]The principle of reciprocity shall be taken into account in the assessment. The decision can only be taken if the foreign State appends a reasoned justification when submitting his request.

**(2)** The requests shall be submitted to the President's office or to the Ministry of Justice or the Ministry of Foreign Affairs in order to be conveyed to the President's office.

**(3)** For the execution of requests submitted by the governments of foreign States on the freezing of assets, a security deposit may be requested from the relevant country.

**(4)** The decision on the request on freezing of

assets issued by the President of the Republic shall be notified to the requesting State by the Ministry of Foreign Affairs.[126]

**(5)** The decision on the freezing of assets made within the ambit of this Article may be repealed in cases where an investigation had not been initiated within a period of one year from the date of publication of this decision in the Official Gazette."[127]

The first decision issued in this context concerned the freezing of assets of a Palestinian citizen living in Lebanon and underlined that Article 6 of Law No. 6415 is rooted in the Security Council Resolution 1373[128]which calls upon all States to cooperate as follows: "(b) Exchange information in accordance with international and domestic law and cooperate on administrative and judicial matters to prevent the commission of terrorist acts; (c) cooperate, particularly through bilateral and multilateral arrangements and agreements, to prevent and suppress terrorist attacks and take action against perpetrators of such acts [...]; (d) Increase cooperation and fully implement the relevant international conventions and protocols relating to terrorism and Security Council resolutions 1269 (1999) and 1368 (2001)".[129] According to MASAK statistics, six decisions pursuant to Article 6 of Law No. 6415 have been issued as of January 2019.[130] Decisions are rarely taken under this provision since Turkey automatically and periodically freezes assets of suspected terrorists which leaves Article 6 of Law No. 6415 a small scope of application.

It can there fore be concluded that Turkey meets its obligations resulting from the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism as well as the United Nations Security Council resolution 1373.

Turkey is a Member State of the FATF since 1991. In its last mutual evaluation, which dates from 2014,the FATF, referring to the 40 Recommendations and 9 Special Recommendations as adopted in 2004, observed that overall Turkey "has reached a

satisfactory level of compliance with all core Recommendations and four of the five key Recommendations. It has not yet reached a satisfactory level of compliance with SR. III [i.e. Special Recommendation 3] although it has taken concrete actions and made significant progress, including through legislation, with the aim to address the deficiencies identified in its 2007 MER [i.e. mutual evaluation report]. [...] While Turkey has made considerable efforts to strengthen its AML/CFT [i.e. anti-money laundering and counter-financing terrorism] regime since 2007 across all areas of activity, it is not yet sufficiently compliant with Recommendations 6, 21, 22, 24 and Special Recommendation VII. Their current level of compliance is equivalent to PC [i.e. partially compliant]."[131] In the light of these observations, the FATF decided in 2014 not to monitor Turkey anymore under its on-going global anti-money laundering and counter terrorist financing compliance process.[132]

The 4thround mutual evaluation of Turkey will be held in 2019.

Turkey combats FTFs within the legal boundaries of the Turkish Criminal Code No. 5237 and the Counter-Terrorism Code No. 3713 as well as UN Conventions and UNSecurity Council Resolutions. According to the Turkish Ministry of Foreign Affairs, with regards to the issue of countering the flow FTFs to conflict zones, Turkey has been taking preventive measures even before the implementation of UNSecurity Council Resolution 2178. Within this framework, Turkey continues to enhance its security apparatus in order to prevent the flow of FTFs to the region and imposes restrictions to the entry of individuals suspected of being members or sympathizers of terrorist organizations. Likewise, in accordance with UNSecurity Council Resolution 2178, individuals suspected to have links to terrorist outfits which enter Turkish territory by illegal means are transferred to deportation centres and are subsequently expelled to their country of citizenship after notifying concerned officials of

that country. Moreover, the Risk Analysis Groups located in various airports and bus terminals in Turkey to scrutinize suspected individuals and prevent their entry when necessary. Currently, there are around 70.000 travel ban decisions issued against persons for suspectful terrorist activities. Furthermore, 22 Risk Analysis Groups located in 16 cities designated around 6.000 people as in acceptable passenger and more than 6.000 people deported on account of suspicious terrorist-related activities. In addition, Turkish security forces regularly conduct operations against ISIL, ANF, and Al-Qaeda links located in Turkey.[133] Furthermore, Turkey is an active member of the Anti-ISIL Coalition and is co-leading the FTF working group within this Coalition. Turkey has also successfully concluded Operation Euphrates Shield that significantly reduced ISIL's influence in Iraq and Syria. As mentioned previously, Turkey has also initiated, together with the US, the Global Counter Terrorism Forum (GCTF), and has co-chaired this body between September 2011and April 2016.[134]

# 5.2: United States of America

The September 11 attacks brought changes to customary international law on combating terrorism.[135] Traditionally, the creation of customary international law requires a consistent and general State practice over a considerable period of time (State practice) and the conviction of its obligatory or necessary nature (opinion juris).[136]Following the September 11 attacks, the prerequisite of a State practice was subject to change as to its temporal dimension opening the way to "instant custom".Cheng claimed that: "As international law is a horizontal legal system in which states are both the law-makers and the subjects of the legal system, opinion juries can arise or change instantaneously".[137] The basic idea behind "instant custom" was already present in the earlier jurisprudence of the International Court of Justice (ICJ) which deviated from the traditional concept of international customary law in the *North Sea Continental Shelf* Case. The Court recognised that a customary rule can be created in a short period of time as long as sufficient evidence exists to demonstrate support for customary international law.[138] The instant custom concerning counter-terrorism was triggered by theso-called Bush Doctrine.[139] On 12 September 2001, the 43rdPresident of the United States, George W. Bush,announced that "we will make no distinction between the terrorists who committed these acts and those who harbor them".[140]In that sense the United Nations Security Council resolutions adopted after the September 11 attacks give evidence that almost all States have endorsed the Bush Doctrine.[141]

After the September 11 attacks, all constitutional bodies of the Unites States of America have constantly extended the powers of both the military and the police forces in order to prevent any harm to national security stemming from terrorism. The USA Patriot Act, signed into law only 45 days after the September 11 attacks,defines both domestic and international terrorism[142] and assigns various counter-terrorist powers to the government, including the power

to seize of assets. Furthermore, the USA Patriot Act created new criminal offences like harbouring or concealing terrorists (18 U.S. Code § 2339) and amended existing ones. As to the offence of providing material support to terrorists (18 U.S. Code § 2339/A)"the term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials".[143] 18 U.S. Code § 2339/C(1)which is entitled "prohibitions against the financing of terrorism" reads as follows:

"Whoever, in a circumstance described in subsection (b), by any means, directly or indirectly, unlawfully and will fully provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out;

**(A)** an act which constitutes an offence within the scope of a treaty specified in subsection (e)(7),[144] as implemented by the United States; or

**(B)** any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act;
shall be punished as prescribed in subsection (d)(1)."

Furthermore, a number of measures were adopted by the Treasury Department in order to combat the financing of terrorism. For instance the Executive Order 13224, which lists 28 persons as target in its Annex, was signed by former U.S. president

George W. Bush in September 2001 in order to disrupt and destroy financial support for Al-Qaeda.[145]

The United States of America area member of the FATF. In this context, the last mutual evaluation report was published in December 2016. In this report, the FATF welcomed the national framework of combating the financing of terrorism as well developed and robust. The international and domestic co-operation has improved since 2006. Financial institutions are co-operating well with the government in respect of the Bank Secrecy Act[146] and have systems and procedures for implementing preventive measures, including for on-boarding customers, transaction monitoring and reporting suspicious transactions. The U.S. authorities effectively implement targeted financial sanctions for both terrorism and proliferation financing purposes, though not all U.N. designations have resulted in domestic designations (mainly on the basis of insufficient identifiers).[147]

As to FTFs, the sections following 18 U.S. Code § 2339, particularly 18 U.S. Code § 2339/A and § 2339/C, give broad definitions of harbouring or concealing terrorists and terrorist financing that include cross-border situations. The criminal offence of receiving military-type training from a foreign terrorist organisation is laid down in 18 U.S. Code § 2339/D(1)as follows:

"Whoever knowingly receives military-type training from or on behalf of any organization designated at the time of the training by the Secretary of State under section 219(a)(1) of the Immigration and Nationality Act as a foreign terrorist organization shall be fined under this title or imprisoned for ten years, or both. To violate this subsection, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (c)(4)), that the organization has engaged or engages in terrorist activity (as defined in section 212 of the Immigration and Nationality Act), or that the organization has engaged or engages in terrorism (as defined in section 140(d)(2) of the Foreign Relations Authorization Act, Fiscal Years 1988 and 1989)".[148]

# 5.3: United Kingdom

The United Kingdom (UK) has a long history as to counter-terrorism, probably beginning with Guy Fawkes' attempt to assassinate King James VI and I[149]and the governmental measures taken thereafter which also covered measures in the colonies of the time. In the 20thcentury, the most important challenge stemmed from the Provisional Irish Republican Army (IRA) which sought to end British rule in Northern Ireland using political violence. In the 21stcentury, the UK began to become affected by international terrorism. The 7 July 2005 London bombings that Al-Qaeda officially claimed responsibility for, were UK's first extremist suicide attack that resulted in 52 civilians killed and 700 civilians injured.[150]

The first British legislative act in the field of counter-terrorism was the Prevention of Terrorism Act adopted in 1989. Nowadays, however,the most important legal instrument is the Terrorism Act of 2000.[151] It is clarified in Article 1 subsection (4) of the Act that the term "terrorism" includes actions outside the United Kingdom, that a reference in this Act to any person or to property is a reference to any persons, or to property, wherever situated, that a reference to the public includes a reference to the public of a country other than the United Kingdom and that wherever the term "the government" is used, this means the government of the United Kingdom, of a Part of the United Kingdom or a country other than the United Kingdom. Hence, all provisions of the Act apply equally to domestic terrorists as well as to FTF. Article 14 subsection (1) of the Act defines the term "terrorist property"as follows:

"(a) money or other property which is likely to be used for the purposes of terrorism (including any resources of a proscribed organisation), (b) proceeds of the commission of acts of terrorism, and (c) proceeds of acts carried out for the purposes of terrorism." Pursuant to subsection (2), in "subsection (1)(a) a reference to proceeds of an act includes a reference to any property which wholly or partly, and directly or indirectly, represents the proceeds of the act (including

payments or other rewards in connection with its commission), and (b) the reference to an organisation's resources includes a reference to any money or other property which is applied or made available, or is to be applied or made available, for use by the organisation."

The criminal offences related to the financing of terrorism are laid down in Articles 15 to 18 of the Act. The most crucial offence is "fund-raising"set forth in Article 15 of the Act which reads as follows:

"**(1)** A person commits an offence if he:

**(a)** invites another to provide money or other property, and

**(b)** intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.

**(2)** A person commits an offence if he:

**(a)** receives money or other property, and

**(b)** intends that it should be used, or has reasonable cause to suspect that it may be used, for the purposes of terrorism.

**(3)** A person commits an offence if he:

**(a)** provides money or other property, and

**(b)** knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism.

**(4)** In this section a reference to the provision of money or other property is a reference to its being given, lent or otherwise made available, whether or not for consideration."[152]

Another important legislative act in the field financing of terrorism is the Anti-terrorism, Crime and Security Act adopted in 2001. It assigns the Treasury the power to freeze assets of suspected terrorists and contains procedural rules on counter-terrorism and terrorist-related crimes.[151] In addition to these Acts, there are supplemental legislative Acts amongst which the most important

one is the Proceeds of Crime Act of 2002 which determines how to enforce property freezing or confiscation orders.[152]

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The UK is also a member of the FATF. According to the third Mutual Evaluation Report of 2007, "The UK has a comprehensive legal structure to combat money laundering and terrorist financing. The money laundering offence is broad, fully covering the elements of the Vienna[155] and Palermo[156] Conventions, and the number of prosecutions and convictions is increasing. The terrorist financing offence is also broad. The introduction of the Proceeds of Crime Act 2002 (POCA) has had a significant and positive impact on the UK's ability to restrain, confiscate and recover proceeds of crime. The UK has also established an effective terrorist asset freezing regime. Overall, the UK FIU [i.e. Financial Intelligence Unit]appears to be a generally effective FIU. The UK has designated a number of competent authorities to investigate and prosecute money laundering offences. Measures for domestic and international cooperation are generally comprehensive as well."[157] The report describes the threat situation in the UK as follows: "The UK has substantial experience in responding to terrorist threats and the support networks that make terrorist acts possible; the principal current terrorist threat facing the UK is from extremists using a distorted and unrepresentative version of the Islamic faith to justify violence. This threat is genuinely international in nature. Attacks have been carried out in Britain by both

British nationals and by outsiders. The domestic and international dimensions of the threat are therefore closely linked. The use of banks to move terrorist funds overseas is thought to have declined in response to the tightening of controls in that sector. Two areas of growing concern are: the abuse of charitable organisations to raise and distribute funds, and the abuse of the 'money service business' (MSB) sector (including alternative remittance services) to move funds."[158]

The Report furthermore acknowledges"The UK has established an effective terrorist asset freezing regime. As a member of the European Union, the UK is bound by the EU freezing mechanism. Domestic measures, the Al-Qaida and the Taliban (United Nations Measures) Order 2006 (previously 2002) and the Terrorism (United Nations Measures) Order 2006 (previously 2001), expand upon the coverage of the EU regulations. These measures include a domestic designation process that appears rapid and efficient; a total of 84 individuals and 58 entities had been designated under the 2006 UN Order at the time of the on-site visit. Failure to abide by an asset freeze under the Order is punishable by seven years imprisonment and an unlimited fine. The Bank of England, as Her Majesty's Treasury's (HMT's) agent on asset freezing, is responsible for issuing notices with respect to persons designated and maintains a consolidated sanctions list on its website. The UK has used the powers available under the orders on a number of occasions to take rapid asset freezing action against suspected terrorists."

As to international co-operation the FATF states that "The UK has ratified and implemented the provisions of the Vienna, Palermo and CFT Conventions and the provisions of S/RES/1267(1999) and S/RES/1373(2001). The UK has broad legal provisions to facilitate requests for mutual legal assistance. Standard evidence gathering mechanisms have recently been reviewed and updated in the Crime (International Co-operation) Act 2003[159], and new provisions have been introduced to allow for the restraint and confiscation of instrumentalities of crime at the request of foreign jurisdictions[...]. Money laundering and terrorist financing are extraditable offences; there are no restrictive conditions or impediments existing in law for extradition. The UK can extradite its own nationals. Extradition law and procedure in the UK was significantly altered by the introduction of the Extradition Act 2003[160]." Overall,the FATF rates the UK as largely compliant to its recommendations.

# 5.4: Belgium

Although in 1979 a few IRA attacks took place in Belgium aiming to kill British officials,[161]the most serious terrorist attack took place on 22 March 2016, as three suicide bombings occurred in Belgium, two in Brussels Airport and one at a metro station. Since the Arab Spring, terrorists from the Middle East have intensified their relations with individuals in Belgium making this country the one with the highest number of FTF compared to other European countries. This situation is considered to have contributed significantly to the attacks of 22 March 2016.[162]

Before the September 11 attacks, there existed no particular legislation explicitly addressing terrorist offences. Since then, the Belgian counter-terrorism legislation has been influenced by the EU Framework Decision 2002/475/JHA "EU rules on terrorist offences and related penalties" which require EU Member State to align their legislation and introduce minimum penaties regarding terrorist offences such as preparatory acts linked to terrorist activities (e.g. recruitment and training for terrorism).[163] On 19 December 2003, new criminal offences have been introduced into Belgian Law in order to implement the EU Framework Decision and the 1999 United Nations International Convention for the Suppression of the Financing of Terrorism.

Article 137 § 1 of the Belgian Criminal Code defines a terrorist offence as an offence falling under the offence catalog in § 2 and §3 which by its nature or context may cause serious harm to a country or an international organisation and which is committed intentionally with the aim of seriously intimidating a population or unduly compelling public authorities or an international organisation to take or refrain from taking certain an action or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation. Pursuant to Article 140 § 1 of the Criminal Code any person that participates in the activity of a terrorist group, including the provision of information or of equipment in favour of the group, or by any form of financing of an activity of the terrorist group knowing or having reasonable cause to know that this participation could contribute to the commission of a crime or an offence of the terrorist group is punished by imprisonment between five and ten

years and a penalty from 100 to 5.000 Euros.[164] In 2004, the Law of 11 January 1993 on Preventing the Use of the Financial System for Purposes of Money Laundering has been amended so as to prevent the financing of terrorism as well.[165] Since then financial institutions and other operators involved in monetary flows are obliged to inform the Financial Information Processing Unit of any matters which they suspect to be linked to the financing of terrorism. Article 5 § 2 of this Law defines terrorist financing as the direct or indirect provision or collection of funds by any means, with the intention that they be used or in the knowledge that they will be used, in full or in part, by a terrorist or a terrorist organisation or that one or more terrorist acts be committed.[166]

According to FATF, to which Belgium is a member, Belgium is largely compliant to Recommendation 5 regarding the criminalisation of terrorist financing on a domestic level. Belgium is evaluated partially compliant with Recommendation 6 (targeted financial sanctions related to terrorism and terrorist financing). The implementation of Recommendation 6 in Belgium is principally based on the EU legal framework. The UN definitions of persons in Security Council resolution1988 (relating to the Taliban) and Security Council resolution 1989 (relating to al-Qaida) have been implemented into the EU legal framework by the Council Regulation (EC) No. 881/2002 of 27 May 2002[167] and Council Regulation (EU) No. 753/2011 of 1 August 2011.[168] Nevertheless, there is a major loophole because the mechanism cannot be applied without delay, as defined by the FATF. The requirement to freeze assets provided in Security Council resolution1373 is implemented at European and supplemented at domestic level. However, there is no clear procedure allowing other countries to require Belgium to freeze assets in connection with Security Council resolution1373.[169] The FATF report indicates effectiveness of the legislative measures as follows: "As to whether the penalties provided and imposed for offences under Art. 140 and 141 of the Penal Code are effective and dissuasive, the Belgian authorities indicated that the sentences handed down under

Art. 140 vary from a suspended prison sentence of several months to one of several years - up to 20 in one case - and that they are thus significant and certainly dissuasive. When deciding the length of sentence, the courts take into account the criminal record of the convicted person and the likelihood he/she has of being reintegrated into Belgian society. Sentences also regularly include fines and confiscation, as well as extradition. In all cases, an appraisal of the dissuasiveness and effectiveness of the sanctions for TF (terrorism financing) must take into account the ideology and the degree of indoctrination of some terrorist organisations."[170] Therefore, the FATF placed Belgium in the enhanced follow-up process dwelling on the traditional FATF policy for members with significant shortcomings and involving a more intense follow-up process.[171] In its last follow-up report, the FATF acknowledged the significant overall progress, Belgium has made in resolving the technical compliance shortcomings. Nonetheless "Recommendations 6 and 7 will remain PC [i.e. "partially compliant"], given that targeted financial sanctions can still not be applied without delay. R. 13 remains PC because of the exemption for EEA countries. R. 14 will remain at LC since the proportional and dissuasive nature of the sanctions could not be established on the basis of the information received."In the light of these findings, the FATF decided that Belgium will remain in enhanced follow-up.[172]

The FTF phenomenon is addressed in Articles 140ter, 140quater, 140quinqies and 140 sexies of the Belgium Criminal Code pursuant to which constitutes a criminal offence the act to recruit another person to commit a terrorist offence (Article 140ter) and to provide instruction or training in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods and techniques, for the purpose of committing such an offence (Article 140quater), the act to receive such information or to receive such a training no matter where this act takes place (Article 140quinquies), and the act to leave Belgium terrority pursuing to commit such an offence (Article 140sexies).

# 5.5: France

Although attacks like the Plot of the rue Saint Nicaise on 24 December 1800 make clear that terrorism in France is not a new phenomenon, terrorist attacks have become more intense since the beginning of the 1980s[173] and led the French legislature to adopt the Law on the Fight against Terrorism in 1986.[174] Today, most criminal offences concerning terrorism can be found in the French Penal Code. Article 421-1 of the Penal Code which defines and lists all acts of terrorism reads as follows: "The following offences constitute acts of terrorism where they are committed intentionally in connection with an individual or collective undertaking the purpose of which is seriously to disturb public order through intimidation or terror." Amongst the offences listed this provision are wilful attacks on life, wilful attacks on the phsycical integrity of persons, abduction and unlawful detention, hijacking of planes, vessels or any other means of transport, theft, extortion, destruction, defacement and damage, the production, sale, import or export of explosive substances and more recently offences related to money laundering and insider dealing.[175] Article 421-2-2prohibitsthe financing of terrorism as follows: "It also constitutes an act of terrorism to finance a terrorist organisation by providing, collecting or managing funds, securities or property of any kind, or by giving advice for this purpose, intending that such funds, security or property be used, or knowing that they are intended to be used, in whole or in part, for the commission of any of the acts of terrorism listed in the present chapter, irrespective of whether such an act takes place."

On 13 November 2015, right after the November 2015 Paris attacks, the French President announced a state of emergency throughout France that lasted almost two years and resulted in new counter-terrorism provisions the most important of which is the Law to Strengthen the Internal Security and Counter-Terrorism.[176] This Law forms the basis for preventive measures of counter-terrorism inspired by the state of emergency and applicable until the 31 December 2010 (Article 5 section 2 of the Law) allows the top government official in each département– or, in Paris, the Commissionner of Police –, for instance,to close places of religious worship like mosques and

churches for a maximum term of six months in cases where these places were used to spead ideas or carry out activities that provoke violence, hate or discrimination, that provoke the commission of terrorist acts or that glorify such acts (Article L. 227-1 of the Law of Internal Security as amended by the Law to Strengthen the Internal Security and Counter-Terrorism). The same authorities are allowed to seal off certain areas that they estimate to be vulnerable to attack and to subject individuals to searches if they want to enter the area (Article L. 226-1 of the Law of Internal Security as amended by the Law to Strengthen the Internal Security and Counter-Terrorism).

France is a member of the FATF. According to the Mutual Evaluation Report dating from 2011, "France signed and approved the Vienna Convention of 1988 against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. It also signed and ratified the 2000 Palermo Convention against Transnational Organised Crime. France has largely implemented these conventions, with one reservation (the criminalisation of the acquisition, possession or use of property with knowledge, at the time of receipt, that such property represents the proceeds of crime, is covered in French law by the offence of receiving stolen property (*recel*), which is more restrictive than that of money laundering. France signed and ratified the 1999 United Nations Convention for the Suppression of the Financing of Terrorism and has a very comprehensive array of legal tools for combating the offence of terrorist financing. Measures have been taken to implement United Nations Security Council Resolutions 1267 and 1373; however, these are in general not sufficient".[177]

The MER argues that the "UN Security Council Resolutions 1267 and 1373 are applied in France through Community regulations that are directly applicable throughout the European Union. France may also rely on an 'administrative' or 'sovereign' system for freezing terrorist assets, implemented nationally through the Law of 23 January 2006 on combating terrorism, which includes various provisions relating to security and border controls. The aim of this system is to supplement, rather than replace, freezing operations carried out

under EU regulations and existing systems of legal co-operation. France has made limited use of its national freezing system (it has only been implemented against persons or entities domiciled in France and not included in the list appended to Common Position 2009/468/CFSP). Measures set up at the European level regarding the implementation of S/RES/1267 are relatively comprehensive. It should be noted, however, that the situation envisaged by the UN Resolution for the freezing of assets owned or controlled by persons or entities acting on behalf of, or at the direction of, designated persons or entities is not covered by EU legislation, and it has not been demonstrated that the French legislation fills the gap on this point. In addition, the time taken to pass EU regulations aimed at integrating amendments to the list published by Committee 1267 can be relatively long, which means that the obligation to freeze terrorist funds without delay is not observed; it has not been demonstrated that the French legislation fills the gap on this point. Regarding the implementation of S/RES/1373, France has taken no steps to enable the freezing of funds or other assets owned by terrorists or terrorist organisations with no links outside the EU. Lastly, the instructions to the financial sector, non-financial sector and, more generally, to other persons or entities liable to own funds or other designated assets are generally lacking in effectiveness and clarity."[178]

The French Penal Code also punishes any kind of participation which inevitably including FTF activities. Article 421-2-1 of the Penal Code reads as follows: "It is also an act of terrorism to participate in a group formed or in an association established for the preparation, characterised by one or more material actions, of any of the acts of terrorism provided for under the previous Articles."Additionally, the acts of provoking terrorist acts or to publicly justify such acts (Articles 421-2-5) and of preparing the commission of a terrorist act (Article 421-2-6) constitute criminal offences.

# 5.6: Spain

The Spanish Legislation on counter-terrorism can be traced back to the end of the 19th century, namely to the Law Against Offences Committed Using Explosive Substances of 1894 and the Law Against Offences Against Persons and Property Committed or Attempted Using Explosive or Flammable Substances of 1896.[179] But the first modern counter-terrorism legislation is the Law of17October 1934 which defined parameters all terrorist attacks have in common: The use of violent means, the specific purpose to intimidate the public in order to achieve social or political objectives and the death or damage affecting civilians. However, the first law that used the term "terrorist offences"was the Law of 23 November 1935. Franco's dictatorship which was established in 1939 and ended in 1976resulted in various forms of counter-extremism.[180] The most important one was the establishment of ETA (Basque Homeland and Liberty), an armed leftist separatist group,in 1959.Theorganisation, which was dissolved in 2018, was classified as terrorist organisation in Spain, the USA and the European Union. From 1959 to 2010, ETA killed approximately 830 individuals in violent campaigns such as bombings and assasinations.[181] When it comes to Al-Qaeda, the major attack on Spanish territory were the 2004 Madrid train bombings that killed 192 people and injured around 2000.[182] On 17 August 2017, ISIL-affiliated terrorists drove into pedestrians in Barcelona and killed 14 people.

Chapter VII of the Spanish Penal Code[183]deals with terrorist offences without giving a definition of the term "terrorism". However, Article 571 of the Penal Code gives the following definition of the term "terrorist organisation or group": "For the purposes of this Code,terrorist organisations or groups shall be those groupings that, meeting the prerequisites laid down in Article 570bis section 1 subsection 2 and in Article 570ter section 1 subsection 2, have the purpose or object of the commission of any of the offences set forth in the following provisions of this Code." Article 570bis section 1subsection 2 reads as follows: "For the purposes of this Code, a criminal organisation is construed by a stable group formed by one or

more persons, for an indefinite term, in collusion and co-ordination to distribute diverse tasks or duties in order to commit criminal offences." Article 570ter section 1subsection 2 reads: "For the purposes of this Code, a criminal group shall be construed as the association of more than two persons who, without fulfilling any or a number of the characteristics of a criminal organisation defined in the preceding Article, has the purpose or object of perpetrating criminal offences concertedly."Pursuant to Article 572 of the Code, "1. Whoever promotes, forms, organises or directs a terrorist organisation or group shall be punished with imprisonment from eight to fourteen years and special barring from public employment and Office for a term from eight to fifteen years; 2. Whoever actively participates in the organisation or group, or forms part thereof, shall be punished with imprisonment from six to twelve years and special barring from public employment and Office for a term from six to fourteen years."The Articles that follow provide certain offences of terrorism. Article 576 of the Code particularly focuses on the financing of terrorism and provides:"1. Punishment by imprisonment from five to ten years and a fine of the triple to the quintuple of its worth shall be handed down to whoever, with whatever means, directly or indirectly, receives, acquires, possesses, uses, converts, transfers or commits any other activity with assets or values of whatever class with the intention that they be used or knowing that they will be used, fully or partially, for the commission of any offence set forth in this Chapter." 2. If the assets or values were actually placed at the disposal of the person being responsible for the terrorist offence, this shall be punished as co-perpetration or complicity, as appropriate, provided this involves a higher penalty. 3. In the event that the conduct referred to in section 1 of this Article has been carried out by attacking the estate, committing extortion, falsifying documents or committing any other criminal offence, they shall be punished with the penalty that is superior to the degree they correspond to, without prejudice to impose in addition to that the penalty that applies according to the previous Aricles. 4. Whoever, being specifically bound

by law to collaborate with the authorities in the prevention of terrorism financing activities, gives rise, due to serious negligence in the fulfilment of those obligations, to any of the conducts described in section 1 of this Article not being detected or prevented shall be punished with the penalty lower by one or two degrees to that foreseen herein. 5. When, pursuant to the terms established in Article 31bis of this Code, a legal person is responsible for the offences defined in this Article, it shall have the following penalties imposed thereon: a) Fine from two to five years, if the offence committed by a natural person has a punishment of imprisonment foreseen exceeding five years; b) Fine from one to three years, if the offence committed by a natural person has a punishment foreseen of more than two years custodial sentence not included in the preceding subsection. Pursuant to the rules established in Articles 66bis of this Code, the judges and courts may also impose the penalties established in subsections b) to g) of section 7 of Article 33 of this Code."

Spain is a member of the FATF which considers Spain largely compliant in terms of criminalising terrorism and terrorist financing. The overall picture is positive in Spain, though according to the FATF, improvement is needed in a few key areas. The Spanish laws and regulations are technically compliant, or largely compliant, with most of the FATF Recommendations, although there are deficiencies most notably regarding targeted financial sanctions and wire transfers. In terms of effectiveness, Spain performs well in some areas, including financial intelligence and confiscation. The country faces high risks from terrorism and terrorist financing, but has a good understanding of those risks. The national counter-terrorism strategy is focused on disrupting and dismantling terrorist organisations, with a specific focus on the threats to Spain formerly posed by ETA and nowadays especially by Islamist terrorist groups. This strategy has worked, particularly against ETA whose financing and support networks had been effectively shut down. Spain has also had some success disrupting outbound financing destined for extremist terrorist groups

> “Spain is one of the most active countries in Europe for terrorism prosecutions, with the highest numbers of individuals in court proceedings for terrorist offences.”

in the Maghreb. Spain is one of the most active countries in Europe for terrorism prosecutions, with the highest numbers of individuals in court proceedings for terrorist offences. There are numerous convictions for terrorist financing activity, pursuant to the offences of membership in a terrorist organisation and collaboration with a terrorist group. A new stand-alone terrorist financing offence was added to Spain's Penal Code in 2010 (formerly Article 576bis of the Criminal Code, now Article 576) which allows to pursue terrorist financing activities separately from any other form of collaboration, like involvement or membership in a terrorist organisation. Spain demonstrates many of the characteristics of an effective system in this area, and only moderate improvements are needed. It generally provides constructive and timely information or assistance when requested by other countries, including: extradition; the identification, freezing, seizing, confiscation and sharing of assets; and providing information (including evidence, financial intelligence, supervisory and available beneficial ownership information) related to terrorist financing or associated predicate offences. Some problems have arisen in the context of Spain making requests to and sharing assets with non-EU countries with legal systems which are very different to Spain's. However, these issues do not appear to be overly serious or systemic.[184]

# 5.7: Germany

Shortly after the German Criminal Code came into force in 1872,the German Legislature introduced the so-called "Duchesne-Section", named after a Belgian, Mr. Duchesne, who had offered the Archbishop of Paris to assassinate Chancellor Bismarck for the payment of 60.000 Francs: The "Duchesne-Section" is now to be found in Section 30 § 2 of the German Criminal Code: "A person who declares his willingness or who accepts the offer of another or who agrees with another to commit or abet the commission of a felony shall be liable under the same terms."Although the provision does not explicitly refer to terrorism, it is the first answer the German Criminal Code has ever given to the threat of political assassination. The first criminal provisions explicitly referring to terrorism was a reaction to the Germanleft-wing terrorist organisation Red Army Faction (RAF) emerging in the 1970and also known as the Baader-Meinhof Group.[185] Early relations with the Popular Front for the Liberation of Palestine (PFLP) and the Palestine Liberation Organisation (PLO)allowed RAF members to be trained in Palestinian training camps located in Jordan as well as to organise joint operations such as the Entebbe hijacking. However, today, the largest foreign terrorist organisation in Germany is the Kurdish seperatist group PKK. Approximately 14.000 followers generally raise and collect funds in Germany to support PKK activities and sometimes evenperform terrorist activities on German territory. The PKK was prohibited in Germany in 1993 but the organization reinstated in another name at the end of the 1990s.[186] For some years now,Germany is also affected by ISIL: On 19 December 2016, for instance, a Tunisian failed asylum seeker, following instructions made by ISIL, deliberately drove a truck into a Christmas market in Berlin leaving 12 people dead and 56 others injured.

It should be noted that the German provisions on counter-terrorism deserve particular attention within the framework of this study, because the Turkish criminal legislation strongly follows German criminal law. The central criminal provision on terrorism in Germany dwells on the criminal provision prohibiting the forming of criminal organisations set forth in Section 129 of

the German Criminal Code. Section 129 reads as follows:

"**(1)** Whosoever forms or takes part in an organisation the aims or activities of which are directed at the commission of offences with at least two years of imprisonment, shall be liable to imprisonment not exceeding five years or a fine. Whosoever supports such an organisation or promotes members or supporters for it, shall be liable to imprisonment not exceeding three years or a fine.

**(2)** For the purposes of this section, an association means an association of more than two persons geared to the longer term for the pursuit of a higher common interest, independent of the roles of its members, the continuity of membership and structure.

**(3)** Subsection (1) above shall not apply

**1.** if the organisation is a political party which the Federal Constitutional Court has not declared to be unconstitutional;

**2.** if the commission of offences is of merely minor significance for the objectives or activities or

**3.** to the extent that the objectives or activities of the organisation relate to offences under sections 84 to 87.

**(4)** The attempt to form an organisation as indicated in subsection (1) above shall be punishable.

**(5)** In especially serious cases falling within the ambit of the first sentence of subsection 1 the penalty shall be imprisonment from six months to five years. An especially serious case typically occurs if the offender is one of the ringleaders or hintermen of the organisation. In the cases of the first sentence of subsection 1 the penalty shall be imprisonment from six months to ten years if the aim or the activity of the criminal organisation is directed at the commission of an offence set out in section 100b (2) No 1 (a), (c), (d), (e), and (g)– insofar with the exception of offences pursuant to section 239a or section 239b of the Criminal Code – to (m), Nos 2to 5 and 7 of the Code of Criminal Procedure.

**(6)** The court may order a discharge under subsections (1) and (4) above in the case of accomplices whose guilt is of a minor nature or whose contribution is of minor significance.

**(7)** The Court may in its discretion mitigate the sentence (section 49(2)) or order a discharge under these provisions if the offender

**1.** voluntarily and earnestly makes efforts to prevent the continued existence of the organisation or the commission of an offence consistent with its aims; or

**2.** voluntarily discloses his knowledge to a government authority in time so that offences the planning of which he is aware of may be prevented;

if the offender succeeds in preventing the continued existence of the organisation or if this is achieved without his efforts he shall not incur criminal liability."

Article 129a of the Criminal Code which is entitled "forming terrorist organisations" reads as follows:

"**(1)** Whosoever forms an organisation (Section 129 subsection 2) whose aims or activities are directed at the commission of

**1.** murder under specific aggravating circumstances (section 211), murder (section 212) or genocide (section 6 of the Code of International Criminal Law) or a crime against humanity (section 7 of the Code of International Criminal Law) or a war crime (section 8, section 9, section 10, section 11 or section 12 of the Code of International Criminal Law); or

**2.** crimes against personal liberty under section 239a or section 239b,

**3.** (repealed)

or whosoever participates in such a group as a member shall be liable to imprisonment from one to ten years.

**(2)** The same penalty shall be incurred by any person who forms an organisation whose aims or activities are directed at

**1.** causing serious physical or mental harm to another person, namely within the ambit of section 226,

**2.** committing offences under section 303b [i.e. computer sabotage], section 305 [i.e. destruction of buildings], section 305a [i.e. destruction of important equipment] or offences endangering the general public

under sections 306 to 306c [i.e.arson] or section 307(1) to (3) [i.e. causing a nuclear explosion], section 308(1) to (4) [i.e. causing an explosion], section 309(1) to (5) [i.e. misuse of ionising radiation], section 313 [i.e. causing flooding], section 314 [i.e. causing a common danger by poisoning] or section 315(1), (3) or (4), section 316b(1) or (3) [i.e. disruption of public services] or section 316c (1) to (3) [i.e. attacks on air and maritime traffic] or section 317(1) [i.e. disruption of telecommunications facilities],

**3.** committing offences against the environment under section 330a(1) to (3) [i.e. causing a severe danger by releasing poison],

**4.** committing offences under the following provisions of the Weapons of War (Control) Act: section19 (1) to (3) [i.e. penal provisions on nuclear weapons], section 20(1) or (2) [i.e. penal provisions on biological and chemical weapons], section 20a(1) to (3) [i.e. penal provisions on anti-personal mines], section 19 (2) No 2 or (3) No 2, section 20(1) or (2), or section 20a(1) to (3), in each case also in conjunction with section 21, or under section 22a(1) to (3) or

**5.** committing offences under section 51(1) to (3) of the Weapons Act;[187]

or by any person who participates in such a group as a member, if one of the offences stipulated in Nos 1 to 5 is intended to seriously intimidate the population, to unlawfully coerce a public authority or an international organisation through the use of force or the threat of the use of force, or to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a state or an international organisation, and which, given the nature or consequences of such offences, may seriously damage a state or an international organisation.

**(3)** If the aims or activities of the group are directed at threatening the commission of one of the offences listed in subsection (1) or (2) above, the penalty shall be imprisonment from six months to five years.

**(4)** If the offender is one of the ringleaders or hintermen the penalty shall be imprisonment of not less than three years in cases under subsections (1) and (2) above, and imprisonment from one to ten years in cases under subsection (3) above.

**(5)** Whosoever supports a group as described in subsections (1), (2) or (3) above shall be liable to imprisonment from six months to ten years in cases under subsections (1) and (2), and to imprisonment not exceeding five years or a fine in cases under subsection (3). Whosoever recruits members or supporters for a group as described in subsection (1) or subsection (2) above shall be liable to imprisonment from six months to five years.

**(6)** In the cases of accomplices whose guilt is of a minor nature and whose contribution is of minor significance, the court may, in cases under subsections (1), (2), (3) and (5) above, mitigate the sentence in its discretion (section 49(2)).

**(7)** Section 129(7) shall apply mutatis mutandis.

**(8)** In addition to a sentence of imprisonment of not less than six months, the court may order the loss of the ability to hold public office, to vote and be elected in public elections (section 45(2) and (5)).

**(9)** In cases under subsections (1), (2), (4) and (5) above the court may make a supervision order (section 68(1))".[188]

Until recently, the financing of terrorist organisations could only be prosecuted based on Section 129a (5) of the Criminal Code, which criminalises the support of terrorist organizations. Since 2015, the financing of terrorism is an offence punishable under Section 89c of the German Criminal Code which reads as follows:

"**(1)** Whosoever collects, accepts or makes available any assets knowing or with the intention that they be used by another person for the commission of

**1.** murder under specific aggravating circumstances (section 211), murder (section 212), genocide (section 6 of the Code of International Criminal Law), a crime against humanity (section 7 of the Code of International Criminal Law), a war crime (section 8, section 9, section 10, section 11 or section 12 of the Code of International Criminal Law), injury by dangerous means (section 224) or injury resulting in severe bodily or mental harms for another person, especially of the kind set forth in section 226,

**2.** crimes against personal liberty under section 239a or section 239b,

**3.** offences under section 303b [i.e. computer sabotage], section 305 [i.e. destruction of buildings], section 305a [i.e. destruction of important equipment] or offences endangering the general public under sections 306 to 306c [i.e.arson] or section 307(1) to (3) [i.e. causing a nuclear explosion], section 308(1) to (4) [i.e. causing an explosion], section 309(1) to (5) [i.e. misuse of ionising radiation], section 313 [i.e. causing flooding], section 314 [i.e. causing a common danger by poisoning] or section 315(1), (3) or (4), section 316b(1) or (3) [i.e. disruption of public services] or section 316c (1) to (3) [i.e. attacks on air and maritime traffic] or section 317(1) [i.e. disruption of telecommunications facilities],

**4.** offences against the environment under section 330a(1) to (3) [i.e. causing a severe danger by releasing poison],

**5.** offences under the following provisions of the Weapons of War (Control) Act: section19 (1) to (3) [i.e. penal provisions on nuclear weapons], section 20(1) or (2) [i.e. penal provisions on biological and chemical weapons], section 20a(1) to (3) [i.e. penal provisions on anti-personal mines], section 19 (2) No 2 or (3) No 2, section 20(1) or (2), or section 20a(1) to (3), in each case also in conjunction with section 21, or under section 22a(1) to (3),

**6.** offences under section 51(1) to (3) of the Weapons Act,[189]

**7.** an offence under section 328(1) or (2) or section 310(1) or (2),

**8.** an offence under section 89a(2a)

shall be liable to imprisonment from six months to ten years. In the cases of Nos 1 to 7, sentence 1 is only to be applied if the activity is designed to seriously intimidate the population, to unlawfully coerce a public authority or an international organisation through the use of force or the threat of the use of force, or to significantly impair or destroy the fundamental political, constitutional, economic or social structures of a state or an international organisation, and if, given the nature or consequences of such offences, may seriously damage a state or an international organisation.

**(2)** The same penalty shall be incurred by anyone who – under the conditions of the second sentence of subsection 1 – collects, accepts or makes

available any assets with the intention to commit one of the offences listed in the first sentence of subsection 1 himself.

**(3)** Subsections 1 and 2 also apply if the offence is committed in another country. Whenever it is committed outside the member states of the European Union, this shall only apply if the offender is German citizen or a foreign national whose main livelihood is in Germany or if the offence financed is to be accomplished in within the territory of the Federal Republic of Germany or by or against a German citizen.

**(4)** In the cases of subsection 3 2nd sentence above the prosecution shall require the authorisation of the Federal Ministry of Justice and Consumer Protection. If the offence is accomplished on the territory of another member state of the European Union, the prosecution shall require the authorisation of the Ministry of Justice and Consumer Protection if the preparation was neither performed by a German citizen nor the offence financed to be committed within the territory of the Federal Republic of Germany or by or against a German citizen.

**(5)** If the assets for an offence falling under the ambit of subsection 1 or 2 are of minor value, the penalty shall be imprisonment from three months to five years.

**(6)** The court mitigates the sentence (section 49 (1)) or may order a discharge if the offender's guilt is of minor nature.

**(7)** The court may in its discretion mitigate the sentence (section 49(2)) or order a discharge under this provision if the offender voluntarily relinquishes the further preparation of the offence and averts or significantly reduces the danger caused and realized by him that any other person may further prepare or accomplish this act or if he voluntarily prevents the accomplishment of this offence. If the danger is averted or significantly reduced or if the accomplishment of the offence is prevented regardless of the offender's actions, he shall not be liable if he has made a voluntary and earnest effort to reach that goal."

Germany is a member of the FATF since 1990. In its Mutual Evaluation Report from 2010, the FATF indicated that in August 2009 Germany enhanced its Counter Finance of Terrorism requirements by criminalising the financing of terrorist acts and individual terrorists, but that technical deficiencies still remained. The financing of terrorist

organizations was already criminalised and all three Counter Finance of Terrorism offences are predicates for Money Laundering. However, the FATF considered them to be not fully consistent with the FATF standard because, inter alia, they do not cover all offences designated under the United Nations Convention for the Suppression of the Financing of Terrorism; a "terrorist act" does not cover serious bodily injuries; and "funds" must, in some cases, be "not merely insubstantial." Poor statistics meant that effective implementation of Terrorist Finance offences could not be established.[190] Furthermore the FATF stated that "Terrorist funds or other assets may be frozen, without delay, largely in line with relevant UNSCRs [i.e. Security Council resolutions]. However, some requirements to freeze do not apply to all EU-residents and some apply, as far as certain EU-residents are concerned, only to funds, not other assets."[191]

In its 3rd Follow-Up Report dating from 2014 the FATF acknowledged some improvements in German Law regarding terrorism, although according to this report certain deficiencies still remained. As for the Special Recommendation 1 regarding UN instruments, "most of the technical deficiencies in this Recommendation were related to shortcomings in the Terrorist Financing offence and the freezing regime (SR. III). None of those elements has been addressed; therefore the compliance remains at PC [i.e. Partially Compliant] level". As regards Special Recommendation 3 concerning the freezing of terrorist assets, the FATF criticised that "Germany has not yet addressed the main technical deficiencies with respect to the freezing regime which lack provisions for the so-called "EU internals" and have a too broad interpretation of legal privilege; therefore it was not possible to consider rating at LC [i.e. Largely Compliant] level."[192]

The next FATF evaluation will be carried out following an on-site visit that is planned for the end of 2020. Given that Section 89c of the German Criminal Code addresses the problems identified by the FATF and came into force after the latest Follow-Up Report, the FATF will have reason to consider Germany compliant with Special Recommendations 1 and 3.

The FTF phenomenon is partly addressed in Section 129b(1) of the German Criminal Code, which reads as follows:

"Section 129 and Section 129a shall apply to organisations abroad. If the offence relates to an organisation outside the Member States of the European Union, this shall not apply unless the offence was committed by way of an activity exercised within the Federal Republic of Germany or if the offender or the victim is a German citizen or is found within Germany. In cases which fall under the 2nd sentence above the offence shall only be prosecuted on authorisation by the Federal Ministry of Justice and Consumer Protection. Authorisation may be granted for an individual case or in general for the prosecution of future offences relating to a specific organisation. When deciding whether to give authorisation, the Ministry shall take into account whether the aims of the organisation are directed against fundamental values of a state order which respects human dignity or against the peaceful coexistence of nations an which appear reprehensible when weighing all the circumstances of the case."

Section 89a of the German Criminal Code concerns the preparation of a serious violent offence endangering the State:

"**(1)** Whosoever prepares a serious offence endangering the state shall be liable to imprisonment from six months to ten years. A serious violent offence endangering the state shall mean an offence against life under Sections 211 or 212 or against personal freedom under Sections 239a or 239b, which under the circumstances is intended to impair and capable of impairing the existence or security of a state or of an international organisation, or to abolish, rob of legal effect or undermine constitutional principles of the Federal Republic of Germany.

**(2)** Subsection (1) above shall only be applicable if the offender prepares a serious violent offence endangering the state by;

**1.** instructing another person or receiving instruction in the production or the use of firearms, explosives, explosive or incendiary devices, nuclear fission material or other radioactive substances, substances that contain or can generate poison, other substances detrimental to health, special facilities necessary for the commission of the offence or other skills that can be of use for the commission of an offence under subsection (1) above,

**2.** producing, obtaining for himself or another, storing or supplying to another weapons, substances or devices and facilities mentioned under No. 1 above,

**3.** obtaining or storing objects or substances essential for the production of weapons, substances or devices and facilities mentioned under No. (1) above, or

**(2a)** Subsection (1) above shall also apply if the offender prepares a serious act of violence endangering the state by undertaking to leave the Federal Republic of Germany for the purpose of committing a serious violent offence endangering the state or one of the acts referred to in Subsection (2) No. 1, in order to travel to a State in which instructions are given by persons referred to in Subsection 2 No. 1.

**(3)** Subsection (1) above shall also apply if the preparation occurs abroad. If the preparation occurs outside the territory of the Member States of the European Union, the aforesaid shall apply

only if the preparation is performed by a German citizen or a foreign citizen whose existence is based within the territory of the Federal Republic of Germany or if the serious violent offence endangering the state so prepared is meant to be committed within the territory of the Federal Republic of Germany or against a German citizen.

**(4)** In the cases of subsection (3) 2nd sentence above the prosecution shall require the authorisation by the Federal Ministry of Justice and Consumer Protection. If the preparation occurred on the territory of another Member State of the European Union, the prosecution shall require the authorisation by the Federal Ministry of Justice and Consumer Protection if the preparation was neither performed by a German citizen nor the serious violent offence endangering the state so prepared to be committed within the territory of the Federal Republic of Germany or by or against a German citizen.

**(5)** In less serious cases the penalty shall be imprisonment from three months to five years.

**(6)** The court may make an order for supervision (Section 68 subsection 1).

**(7)** The court in its discretion may mitigate the sentence (Section 49 subsection 2) or order a discharge for the offence under this provision, if the offender voluntarily gives up the further preparation of the serious violent offence endangering the state, or averts or substantially reduces a danger caused and recognised by him that others will further prepare or commit the offence, or if he voluntarily prevents the completion of the offence. If the danger is averted or substantially reduced regardless of the contribution of the offender or the completion of the serious violent offence endangering the state prevented, his voluntary and earnest efforts to achieve that object shall suffice."

Pursuant to Section 89b of the German Criminal Code, establishing contacts for the purpose of committing a serious violent offence endangering the state constitutes a criminal offence:

"**(1)** Whosoever, with the intention of receiving instruction for the purpose of the commission of a serious violent offence endangering the state under Section 89a subsection 2 No. 1, establishes or maintains contacts to an organisation within the meaning of Section 129a, also in conjunction with Section 129b, shall be liable to imprisonment not exceeding three years or a fine.

**(2)** Subsection (1) above shall not apply if the act exclusively serves the fulfilment of lawful professional or official duties.

**(3)** Subsection (1) above shall also apply if the act of establishing or maintaining contact occurs abroad. Outside the territory of the Member States of the European Union this shall apply only if the act of establishing or maintaining contact is committed by a German citizen or a foreign citizen whose existence is based within the territory of the Federal Republic of Germany.

**(4)** The prosecution shall require the authorisation by the Federal Ministry of Justice and Consumer Protection

**1.** in the cases of subsection (3) 2nd sentence above or

**2.** if the act of establishing or maintaining contacts occurs on the territory of another Member State of the European Union.

**(5)** If the degree of guilt is of a minor nature, the court may order a discharge for the offence under this provision."

# 6. Improving Effectiveness of Counter-Terrorism Measures in Turkey

Terrorism is a global concern and one of the most challenging problems of our time. Turkey has been facing the difficulties rooting in international terrorism since its geographic exposition to the Syrian and Iraqi conflicts. Several bomb attacks from ISIL, PKK and PYD induced Turkey to launch cross-border military operations such as Operation Euphrates Shield, Operation Olive Branch and Operation Peace Spring in order to secure its borders from international terrorism. Additionally, more than four million Syrian refugees that arrived in Turkey raise problems and sometimes led to tensions between Turkey and other European countries. Turkey has been hosting more than 4 million immigrants since 2011.[193] Furthermore, an attempted coup d'état

was defeated in 2016 and Turkey announced the state of emergency holding the Gülen Movement responsible, that Turkey considers as a terrorist organisation. Additionally, Turkey faced a currency crisis in 2018. All these circumstances should be borne in mind while assessing Turkey's efforts in the field of counter-terrorism. Turkey's fight against terrorism, particularly with regard to FTFs and the financing of terrorism, might be improved in the light of the following recommendations:

1- In order to prevent terrorist offences, firstly, Turkey should deal with home grown radicalization. Turkey is a secular State with a population predominantly consisting of Sunni Muslims. Besides, Turkey has long suffered from extreme left, extreme right and other extremist ideas since the foundation of the Republic. Therefore, an extreme left terrorist organisation like the PKK and religiously motivated terrorist organisations as ISIL can co-exist in Turkey at the same time. As a solution, "whole of government" and "whole of society" approaches may be adopted. The whole-of-government approach refers to joint activities conducted by diverse governmental institutions in order to provide a common solution to a particular issue. On the other hand, the whole-of-society approach also involves non-governmental and private actors in addition to governmental institutions. There is no doubt that terrorism is a common concern for both the government and society. In the realisation of the approach, a map for Turkey's social structure needs to be established and examined thoroughly to find out where intervention turns out to be necessary. In this sense, governmental and private institutions need to work closely in order to create a wholistic approach for counter-terrorism.

2- Young FTFs are often recruited on the Internet and social media such as Twitter, Facebook and Youtube. However, attention needs to be paid to the risk that interventions on the Internet like surveillance or blocking access to certain websites might result in violations of human rights and fundamental freedoms such as freedom of expression. In this sense, international co-operation with other European countries and the United States of America will make these efforts more effective, since internet servers are spread worldwide and social media providers such as Twitter, Facebook and Youtube are based on US territory. In this regard, States, including Turkey, can support the works of Global Internet Forum to Counter Terrorism (GFCT)[194] founded

by Microsoft, Facebook, Twitter and Youtube in order to curb the spread of terrorist content online. For instance Twitter suspended around 1.2 million accounts as of 2018. In addition, the GIFCT is working in close partnership with the CTED. Therefore, as a wholistic approach, multilateral co-operation between States, the United Nations and private companies will prevent recruitment of FTFs more effectively. By doing so, fundamental human rights, particularly the freedom of expression and the right to privacy, need to be respected.

3- Turkey has a long border with Syria and Iraq. Since these two country turned into turmoil, their borders with Turkey have become insecure. Therefore, Turkey launched three major operations, namely Euphrates Shield, Olive Branch and Peace Spring, along its borders and effectively monitors refugees and Syrian groups to find out whether they are disguised FTFs or not. Furthermore, Turkey needs to strengthen border security regarding travel documents and identity papers. The country adopted effective measures in this regard and is improving current measures regarding counter-terrorism. The risk analysis groups and deportation centers are working actively on travelling FTFs and act swiftly in suspicious cases. In this context, the API and PNR systems are also being use deffectively. At this point, all precautions against cyber attacks or hacking need to be adopted as well.

4- Turkey's measures against the financing of terrorism are generally effective, although the latest FATF report demonstrates that there were some deficiencies which need to be addressed. However, especially after 2013, Turkey adopted new administrative and legislative counter-terrorism instruments in the light of the FATF recommendations. The recent amendments of Codes No. 6415 and 3713 which assert the power to freeze assets to the Presidency of the Republic might accelerate the decision-making process.

5- As demonstrated in the comparative study above, policies to prevent radicalisation are as important as the prosecution and punishment of FTFs. Good examples of prevention policies are the Radicalisation Awareness Network (RAN), an EU-wide network that brings practitioners together in order to elaborate policies for the prevention of violent extremism in special working groups such as "working group on deradicalisation and exit interventions (DERAD)". In Germany, the initiative "EXIT-Germany"

works on deradicalisation strategies and assists individuals willing to leave the extreme right-wing movement and start a new life. The British counter-terrorism strategy "Prevent" also aims to challenge terrorist ideologies, to protect vulnerable people and support institutions in order to prevent extremism. After facing several terrorist attacks, Belgium introduced "Plan R" as another measure. Comparative strategies should be examined thoroughly by Turkish authorities. In this regard, a 'national plan' on P/CVE policies indicating institutional division of work should be drafted.

6- While Turkey cooperates with non-governmental organisations and private foundations,a stronger cooperation with religious communities in the elaboration and implementation of deradicalisation policies should be considered. The Directorate of Religious Affairs (Diyanet) already conducts a reintegration project for prisoners. Non-governmental organisations generally have focused on assistance for Syrian asylum seekers. In this regard, the Turkish Government might encourage non-governmental organisations, the media and educational institutions to introduce counter-narratives of radicalisation. Furthermore, the The Directorate of Religious Affairs, Turkish Police Forces and the relevant Ministeries should organise regular meetings to bring experienced practitioners together in order to establish more wholistic perpectives on deradicalisation policies. In this sense, a coordination mechanism should be established under Presidency in order to implement P/CVE policies more efficiently.

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# NOTES

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# Improving the Effectiveness of Turkish Legal Regulations on Foreign Terrorist Fighters in the Light of Comparative and International Law

**REPORT**

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Bu proje Avrupa Birliği ve
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# IMPROVING THE EFFECTIVENESS OF TURKISH LEGAL REGULATIONS ON FOREIGN TERRORIST FIGHTERS IN THE LIGHT OF COMPARATIVE AND INTERNATIONAL LAW

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